INDEX.

ABSENTEE.

1. Every law empowering our courts to decide upon the rights of absentees must be strictly construed, and the formalities prescribed exactly followed. Hill v. Barlow, 142.
2. A mortgage in favor of an absentee, executed and registered by the mortgagor, has its legal effect though not accepted by the mortgagee. Ib.

See CURATOR AD HOC.

ACCESSION.

1. A possessor in good faith, under a title which he honestly believes to be just in point of fact and form, is entitled to his improvements, and is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title must be such as to entitle the party to the prescription of ten years. The possessor in good faith is one who has just reason to believe himself the master of the thing which he possesses, though he may not be so in fact, (C. C. 3414;) the possessor in bad faith, one who knows that he has no title, or that his title is defective. Ib. 3415. Lowry v. Erwin, 192.
2. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. Ib.
3. A possessor without a just title, owes the fruits and revenues from the commencement of his possession. Ib.
4. A purchaser who receives the rents of the property purchased, and subsequently declines to complete the contract on the ground that the vendor

could not make an unincumbered title, is bound to refund the rents so received. Nash v. Parker, 324.

5. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the property producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. Daigle v. Bruzzé, 418.

6. The purchaser of a slave, sold under a *fi. fa.* against a party in possession not shown to have been aware of the defects in the title of the latter, being a possessor in good faith, will be responsible to the owner for the value of his services, only from judicial demand. C. C. 495, 3416.
Haydel v. Betts, 438.

7. A possessor of a plantation and slaves, responsible to the owner for the fruits and revenues, will be bound to account for such a crop as he might have made therefrom, with ordinary good management. The actual production of the plantation, which was proved to have been neglected, is not a just measure of the damages due to the owner. Winter v. Zacharie, 466.

See PLEADING, 13.

AGENCY.

1. Payment of part of a note as agent for the defendant, by one who had drawn it in that capacity, is not evidence of his authority to bind the defendant as drawer of the note. He may have been acting as a general agent, with powers of administration only; the power to draw or endorse a note, or bill, must be express and special. C. C. 2966. Notrebe v. M'Kinney, 13.

2. A power constituting one a "special and general agent and attorney in fact, delegating to him both general and special powers to manage all the business of the constituent, and more especially to draw notes and drafts, and to endorse those made by himself or others," does not authorize the agent to bind his principal as surety, *in solido*, with himself, in a contract relating exclusively to his own interests. Copley v. Flint, 56.

3. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. Rudy v. Harding, 70.

4. A principal cannot plead ignorance of the acts of his agent.
Wolf v. Rogers 97.

5. A master of a steamer has no authority to bind the owners farther than for the necessary expenses of the boat. Lambeth v. Vawter, 127.

6. Where things to be done are not merely acts of administration, or such as facilitate such acts, the power must be express and special. C. C. 2966.
Hill v. Barlow, 142.

7. The exercise of the right of claiming prescription is an act of ownership; and its abandonment is one of alienation, which no agent can do, so as to deprive his principal of his right to claim it, without special authority from the latter. Ib.

8. The possession of an agent, is the possession of the principal.
Beaumont v. Covington, 189.

9. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. But it does not follow, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that these are responsible to the proprietors for each other. Thus, the captain cannot be held responsible to the owners, for damages to which the latter were subjected in consequence of an injury to another vessel, resulting from mismanagement of the steamer during the pilot's watch, and when the captain was asleep. *Per Curiam.* It is physically impossible that the master of a vessel can always be on deck, and he cannot be held liable for every act or omission of the other officers. Davis v. Houren, 255.

10. It is well settled that the ratification of a principal will be inferred from his silence, if, when apprized of an act done by his agent without, or beyond his authority, he does not, within a reasonable time, express his dissent; but no such inference will be drawn, where the act was not done in the name of the principal, nor apparently for his benefit, and the circumstances of the case sufficiently account for the silence of the principal without construing it as an acquiescence in the act. Guimbillot v. Abat, 281.

11. Where a third person attempts to establish the ratification of an unauthorized act of an agent, from the silence, or conduct of the principal, it must clearly appear that he has been misled thereby, or induced to forego some advantage he would otherwise have enjoyed. Ib.

12. An account rendered by an agent to his principal is conclusive against the former, unless he show clearly errors or omissions to his prejudice.
Mornay v. Bordelais, 318.

13. An agent authorized to sell, cannot sell to himself. Allard v. Allard, 320.

14. In an action to rescind a sale made by an agent, whose power to sell is conceded, the manner in which he disposed of the proceeds, whether in payment of a debt due to himself, or not, is a question not before the court. Ib.

15. Where an agent acts within the scope of his authority, his acts are valid, without showing any ratification on the part of his principal. Ib.

See Execution, 11. Insolvency, 12.

APPEAL.

I. *From what Judgments an Appeal may be taken.*

II. *Abandonment of Right to Appeal.*

III. *Application for an Appeal.*

IV. *Parties to Appeal.*
V. *Citation of Appeal.*
VI. *Effect of Appeal in Suspending Execution.*
VII. *Record of Appeal.*
VIII. *Answer of Appellee, and Matters urged for the first time after Appeal.*
IX. *Judgment on Appeal.*

I. *From what Judgments an Appeal may be taken.*

1. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3d March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal. McLean v. Carroll, 43.
2. Where plaintiff sues for the amount of an open account, less than three hundred dollars, he cannot give jurisdiction to the Supreme Court, by claiming conventional interest from a particular period, where there was no agreement to pay it. Goodwin v. Burney, 151.
3. Where the amount really in dispute is under three hundred dollars, the appeal must be dismissed, though at the instance of the party who, by a fictitious claim for interest, attempted to bring the case within the jurisdiction of the Supreme Court. Ib.
4. The 19th section of the act of 25th March, 1828, amending the Civil Code and Code of Practice, which grants an appeal in any case in which it is contended that the right of imposing a tax is contrary to the constitution or to the laws of the state, whatever may be the amount of the tax, refers only to claims for taxes sued for originally before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans; and where the amount claimed is under three hundred dollars the Parish Court in the Parish of Orleans, and the District Court, in the other parishes of the State, are the highest courts to which such an appeal can be taken. Though such a claim were sued for originally in the Commercial Court, no appeal can be taken to the Supreme Court. State v. Grant, 295.

II. *Abandonment of Right to Appeal.*

5. Payment of the costs of the lower court by a defendant who has taken a devolutive appeal, is not such an execution of the judgment, as will take away the right of appeal. Payment of the costs might have been compelled by execution, the appeal not being suspensive. Cuny v. Dudley, 77.
6. Plaintiff having obtained a judgment and issued execution against the defendant, certain property was seized, and sold with the consent of the latter. By an agreement between defendant and the purchaser, it was stipulated,

that if defendant should pay the amount of the judgment, with costs and interest, to the purchaser by a certain time, the sale should be null, and the property belong to defendant; otherwise, the property to belong irrevocably to the purchaser. Defendant afterwards sold his right of redeeming the property, to a third person. *Held*, that these facts amount to a compromise and satisfaction of the judgment, and deprive the defendant of the right of contesting its correctness by appeal. Prentice v. Chewning, 163.

7. In an action to recover a promissory note, or the amount for which it was made, with damages for its detention, the note was sequestered and delivered to the plaintiff on her giving bond to return it, in case it should be decreed to belong to the defendants. Judgment having been rendered in favor of the plaintiff for the note and damages, the defendants appealed from so much of the judgment only as related to the damages, and gave bond for a suspensive appeal in a sum fixed with reference to that part of the judgment. *Held*, that the acquiescence in the part of the judgment not appealed from, was not such a voluntary execution of the decree, as to prevent an appeal from so much of it as assessed damages.

Liles v. New Orleans Canal and Banking Company, 273.

III. *Application for an Appeal.*

8. Where an appeal is applied for after the term of the court at which judgment was rendered, it should be by petition, as required by art. 573 of the Code of Practice, and not by motion. But where an appeal has been allowed, under such circumstances, on motion, and citation has been duly served, and the other requisites complied with, it will not be dismissed for such irregularity. Prudhomme v. Edens, 64.

IV. *Parties to Appeal.*

9. A married woman, not separated from bed and board, cannot appeal from a judgment rendered against her, without the authorization of her husband, or that of the Judge before whom the suit is brought.

Cuny v. Dudley, 77.

10. Any creditor of the husband who alleges, that he has been aggrieved by a judgment for a separation of property between the spouses, may appeal therefrom, though not a party to the suit in the lower court. C. P. 571. C. C. 2408. Compton v. Her Husband, 154.

11. Where no judgment was pronounced in the inferior court on the claim of an intervenor, his appeal will be dismissed. Frazier v. Vance, 271.

12. Where a mortgage creditor of an insolvent who has made a cession of his property appeals from a judgment, allowing the sums claimed by certain law officers for their fees, the latter must be made parties to the appeal. It is not enough that the syndic, who has no interest in a contest between privileged creditors as to their relative rank, should be cited.

Cassidy v. His Creditors, 303.

13. Defendants sued as maker and endorser of a note, severed in their defence.

There was a judgment in favor of the plaintiff against the maker, but against him as to the endorser; and he appealed from the latter alone. On a motion to dismiss the appeal, on the ground that the maker of the note was not made a party to the appeal: *Held*, that defendants having severed in their defence, and their interests being distinct, it was unnecessary to cite a party who had no interest in the matter in controversy between his co-defendant and the plaintiff. Gordon v. Dreux, 399.

14. The fact that a party is a fugitive from justice, cannot affect his right of appeal. State v. Plazencia, 441.

V. *Citation of Appeal.*

15. The true meaning of the first section of the act of 22d March, 1843, chap. 64, is, that if, at the same term at which a judgment has been rendered, an appeal be moved for in open court, no citation of appeal, or other notice to the appellee shall be necessary, he being considered to be in court during the term, and bound to take notice of what passes; but where an appeal is applied for after the term, the usual citation must be served on the appellee. Prudhomme v. Edens, 64.

16. Where the Clerk has neglected to deliver copies of the petition and citation of appeal to the Sheriff, to be served as required by art. 581 of the Code of Practice, on parties, residents of the parish, who were made appellees in the petition, further time will be allowed to have them cited. Lambeth v. Vawter, 127.

17. On an appeal by the defendant, from a judgment in favor of the State, for the amount of a recognizance entered into by him for his appearance at court, the District Attorney who obtained the judgment is the proper person on whom the citation of appeal should be served. State v. Plazencia, 441.

VI. *Effect of Appeal in Suspending Execution.*

18. Art. 624 of the Code of Practice, which declares, that one, in whose favor a judgment has been rendered which is subject to appeal, cannot take out execution until ten days shall have elapsed, counting from the notification to the opposite party, must be construed in connection with art. 575, of the same Code, and be understood as excluding Sundays from the ten days. It could not have been intended to allow an execution, so long as the defendant is entitled to a suspensive appeal. Dayton v. Commercial Bank of Natchez, 17.

19. If execution be issued after a suspensive appeal, the Judge of the Inferior Court may grant an injunction to prevent a sale. *Per Curiam.* This is not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal. Aubert v. Robinson, 463.

20. An appeal from an order of seizure and sale will be suspensive, if taken within ten days, Sundays not included, from the notice of judgment to the party cast. C. P. 575. Ib.

VII. *Record of Appeal.*

21. Where an appeal is taken, the transcript of the record must be filed within three judicial days after the return day, or it will be too late. The rule, that when an act is to be done within a given time, it may be done afterwards if nothing occurs to prevent it, does not apply to such a case.

Van Campen v. Morris, 79.

22. Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record; and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. State v. Phelps, 308.

23. It is no ground for dismissing an appeal from a final judgment, that the record does not contain testimony, not reduced to writing, taken in support of an exception of the other party, the judgment sustaining which was acquiesced in by the appellant, and had its effect. Gordon v. Dreux, 399.

VIII. *Answer of Appellee, and Matters urged for the first time after Appeal.*

24. Where a witness has not been interrogated in the inferior court as to his means of knowing a signature to which he testified, no objection to the want of a disclosure of such means, can avail after appeal.

Berryman v. Dahlgren, 188.

25. A defence that a memorandum of a contract of sale had been altered by the plaintiffs without the consent of the defendants, not made in the lower court, cannot be urged after appeal. Grimshaw v. Hart, 265.

26. A prayer, by the appellee for an amendment of the judgment, filed the day before the case was called for argument, and after a joinder in error, is too late. C. P. 890. Mooney v. Cage, 494.

IX. *Judgment on Appeal.*

27. Where pending an appeal from a judgment removing a tutrix, the minor marries, thereby emancipating herself, the appeal, thus being without an object, will be dismissed. Tutorship of Wilds, 31.

28. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. Lovelace v. Taylor, 92.

29. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision

of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. Ib.

30. An appellee will not be allowed damages for the appeal, as a frivolous one, where he has availed himself of it to ask for an amendment of the judgment of the lower court. Gorham v. Hayden, 450.

See Husband and Wife, 18.

ASSAULT AND BATTERY.

See Offences and Quasi-Offences, 8.

ASSIGNMENT.

See Insolvency, 10, 11, 12.

ATTACHMENT.

1. Plaintiffs having obtained a judgment against defendant in another State, instituted a suit on the judgment here, attaching certain property, and, pending the attachment, transferred their judgment to one of their creditors, to be applied towards the satisfaction of his claim. A third person having intervened in the attachment suit, and proved the property to be his, claiming damages for the illegal attachment, against the plaintiffs and their transferee: *Held*, that the damage sustained by the intervenor resulted from the original levy of the attachment; that the plaintiffs having, even after the transfer, a greater interest in the action than their transferee, the latter could not have dismissed the attachment; and that, consequently, judgment for damages could be rendered only against the plaintiffs.
Caldwell v. Mayes, 376.

2. An attachment bond, executed in favor of the defendant, does not enure to the benefit of a third person who intervenes and establishes his right to the property. Not being a party to the bond, and there being no privity of contract between him and the plaintiff in the attachment suit, he cannot sue on it. Edwards v. Turner, 382.

3. As between the principal and surety in an attachment bond, and the defendant in whose favor it is executed, a claim for damages for an illegal attachment is *ex contractu*; but if the property of a third person be attached under proceedings authorizing the seizure of that of the defendant, it is a trespass, and the right of the party injured to obtain reparation arises neither from a contract, nor a quasi-contract, but under art. 2294 of the Civil Code, which

declares that every act of man which causes damage to another, obliges him by whose fault it happened, to repair it. Ib.

4. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502. Ib.

ATTORNEY AT LAW.

1. An attorney at law cannot acknowledge a debt, so as to bind his client. Hill v. Barlow, 142.

2. The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code. Evans v. Wilkinson, 172.

ATTORNEY, DISTRICT.

A District Attorney, prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of the defendant, after trial commenced and evidence given, to insist on a trial. The court has no right to control the attorney of the State, in this respect. State v. Bugg, 63.

See APPEAL, 17.

BANK.

1. Under the provisions of the act of 5th February, 1842, reviving the charters of the Banks in the city of New Orleans, only the debts due to those institutions at the time of the passage of that act, can be considered as forming a part of their "*dead weight.*" Debts subsequently contracted, though between the date of the passage of the act, and its promulgation, or acceptance by the Banks, are not included in the "*dead weight.*" City Bank of New Orleans v. Barbarin, 289.

2. A bank will not be considered as insolvent, merely because it has gone voluntarily, or been forced into liquidation under the act of 14th March, 1842, relative to the liquidation of banks. The provisions of the act do not authorize such a presumption, nor contemplate the insolvency of the Bank as a cause for the forfeiture of its charter; the charter may be forfeited by a violation of its provisions, without the Bank being insolvent. Commissioners of the Exchange and Banking Company of New Orleans v. Mudge, 387.

3. It is only when the whole amount of the capital stock of a bank, together

with its assets, is insufficient to meet its liabilities, that it can be said to be insolvent. Ib.

4. The provision of the act of 26th March, 1842, which declares "that nothing contained in the act to provide for the liquidation of banks, or other laws of the State, shall be so construed as to deny to any persons having notes to pay in banks in liquidation, the right of paying said notes in the bank notes of said liquidating banks;" though it mentions only *notes*, should, by a liberal and fair construction, be extended to all debts due to the banks, though not in the form of notes. The provision of the second section of the act of 5th April, 1843, "that it shall be the duty of each of the banks of the State, at all times, to receive in offset or part offset of debts due to it, its own debts when liquidated and past due, whether for circulation, deposites, or arising from any other source whatever, and whether such bank be, or be not in liquidation, and without reference to the date at which the debtor offering such transfer may have acquired the claim by him offered in offset," may be considered as declaratory of the former intention of the legislator. Ib.

5 No law of this State in existence before 1842 defined the insolvency of a corporation, or provided for its voluntary or forced liquidation. The acts of the 14th, and 26th March, 1842, and 5th April, 1843, apply alike to solvent and insolvent banks, and whether their liquidation be forced or voluntary. They are special laws, for special purposes, and are to be construed together, as *in pari materia*. To them alone, we must look for the mode of proceeding, and for the powers and duties of the commissioners of liquidation. The Legislature intended by these acts to provide specially for the holders of the notes of the banks in the course of liquidation, and to make the circulation of each bank a good offset to debts due to it. These statutes make it the duty of the commissioners to allow such offsets, and they violate no vested right, nor impair the obligation of any contract.

Ib.—Rehearing, 397.

BANK OF THE UNITED STATES.

See CONTRACTS, 5.

BANKRUPTCY.

1. A copy of a decree of a District Court of the United States sitting in Bankruptcy, certified under the signature of the Clerk, appointing an assignee to the estate of a bankrupt, and ordering him to give security in a certain sum for the faithful discharge of his duties, is sufficient evidence of the authority of the person so appointed to sue as assignee, where the exception does not state the grounds on which plaintiff's capacity is denied. It will not be presumed that the certificate was delivered, before the person so appointed had complied with the orders of the court. Faures v. Metoyer, 75.

2. Plaintiff having obtained an injunction from a State court, to stay an execution about to be levied on his property, was subsequently declared a bank-

rupt by the District Court of the United States, under the bankrupt law of 1841. A rule having been afterwards taken in the State court, to show cause why the injunction should not be dissolved, or further security given: *Held*, that by the decree of bankruptcy, the State court was divested of all jurisdiction, having no authority to decide questions involving the adjustment of privileges and liens among the creditors of the bankrupt, or the distribution of the funds of his estate. Lewis v. Fisk, 159.

3. Under the bankrupt law of 1841, all the estate of the bankrupt is, by the issuing of the decree of bankruptcy, *ipso facto*, vested in the assignee. It is his duty to take possession without delay and to administer the property to the best advantage for the benefit of the creditors. If resistance be made, the State courts will grant the necessary process to enable him to do so. The assignee may make himself a party to suits in the State courts in place of the bankrupt, and take the necessary steps to protect the property and interests confided to his care. Ib.
4. If the goods of one who has been declared a bankrupt under the act of 1841, be seized in execution and sold, before possession has been taken by the assignee, they may be recovered in an action against the Sheriff, or the plaintiff in execution, if he accompanied the Sheriff, or specially directed the seizure. Ib.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Consideration.*
II. *Power to draw or endorse in the name of another.*
III. *Accommodation Endorsers.*
IV. *Indulgence, and Release of a Party.*
V. *Protest.*
VI. *Parties to Actions on.*
VII. *Evidence in Actions on.*
VIII. *Interest due on Protested Bills and Notes.*
IX. *Payment.*

I. *Consideration.*

1. The statement on the face of a note, that the consideration for which it was given was the purchase of a tract of land, imposes no obligation on an endorsee to inquire whether his endorser had a good title to the property sold; nor does any such obligation result from its being endorsed, without recourse. Maurin v. Chambers, 68.
2. The maker of a negotiable note cannot urge any inquiry into its consideration, when in the hands of an endorsee, not shown to have had any knowledge of the failure of the consideration before he received it. Ib.

3. On a plea of usury by the maker or accommodation endorser of a note, the holder will be entitled to recover only the amount actually paid by him.
Satterfield v. Compton, 120.

4. Plaintiff having sued his lessee levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount of the rent due to plaintiff by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam.* After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure, under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045. Millaudon v. Worsley, 274.

II. *Power to Draw or Endorse in the Name of another.*

5. Payment of part of a note as agent for the defendant, by one who had drawn it in that capacity, is not evidence of his authority to bind the defendant as drawer of the note. He may have been acting as a general agent, with powers of administration only; the power to draw or endorse a note, or bill, must be express and special. C. C. 2966. Notrebe v. McKinney, 13.

6. After the dissolution of a partnership no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. Rudy v. Harding, 70.

III. *Accommodation Endorsers.*

7. The possession of a note by the maker, after it has been endorsed by a third person, is evidence that the endorsement was an accomodation one.
Satterfield v. Compton, 120.

8. An accommodation endorser, being viewed as a surety, may avail himself of any plea which his principal could have opposed to the holder. Ib.

IV. *Indulgence and Release of a Party.*

9. Action by the transferree after maturity, against the endorsers of a promissory note, executed by the maker for the price of land purchased by him from the payee, and secured by mortgage on the property sold. To enable the maker to secure, by a mortgage of the property, the payment of notes to be given by him to a Bank, in discharge of a debt due by the payee to the Bank, thereby substituting the maker to the payee as debtor to the Bank, the latter, the vendor, executed an act "releasing the mortgage given by the maker," with a stipulation "that the release shall be null and void, unless the mortgage tendered by the maker be accepted by the Bank" within

a fixed period. *Held*, that the substitution of the maker as a debtor to the Bank, was a sufficient consideration for the contract of release; that the payee was precluded by the act from exercising his rights on the note and mortgage, until the expiration of that time; that the endorsers were sureties of the maker; but that whether considered as such, or as mere endorsers, the act having been executed without their asseent, they were discharged. C. C. 3030, 3032. McGuire v. Wooldridge, 47.

10. The holder of a note must retain the faculty of tranferring all his rights against the maker absolutely unimpaired, or the endorsers will be released. He must not agree to give time, and suspend his remedy by precluding himself from suing the maker. Ib.

11. If the holder of a note secured by mortgage, appear at the meeting of the creditors of an insolvent, and vote for a sale of the mortgaged property on terms of credit, he will thereby release the endorser. Ib.

12. In an action against the maker and endorser of a note, the defendants excepted to the action as premature, on the ground that the amount claimed by plaintiff was not yet demandable; as the latter, after the maturing of the note sued on, by a special agreement with the drawer, for a consideration received from him, had granted him a certain time within which to pay the note, which delay had not yet expired. The exception was sustained. After the expiration of the delay, the plaintiff obtained a judgment by default, which was set aside, the defendants filing separate answers, and the endorser urging that he had been discharged by the delay. There was a judgment against the maker, but in favor of the endorser. On appeal: *Held*, that though the fact of granting the delay was shown, the exception having been pleaded by both defendants, proved that the endorser knew that the delay had been granted, and consented to it, and that, having enjoyed the benefit of the plaintiff's indulgence, he is not discharged.

Gordon v. Dreux, 399.

V. *Protest.*

13. Where there are several post offices through which an endorser receives his letters and papers indifferently, notice of protest must be sent to the one nearest his residence; but where he habitually receives his letters and papers through the more distant one, notice through it will be valid.

Mead v. Carnal, 73.—Mechanics and Traders Bank of New Orleans v. Jemison, 90.

14. Notice of protest addressed to "A. B. of the parish of [stating the parish of his residence,] at the post office at [mentioning the office at which he was in the habit of receiving his letters]," and deposited in that office, it being in the place where the protest was made, is a sufficient compliance with the second section of the act of 13 March, 1827, requiring the notice to be addressed to an endorser at his domicil, or usual place of residence. The

addition of the words "at the post office at——," does not affect the sufficiency of the direction.

Mechanics and Traders Bank of New Orleans v. Jemison, 90.

15. The mere erasure of one or more words in an act of protest, and the interlineation of others, will not annul the instrument. Notaries may, at the time, correct omissions or errors in such an act, by erasing words incorrectly used, and by interlining others; but they cannot, after the act is executed, alter or amend it in any respect. To annul an act on account of such interlineations or erasures, it must be proved that they were made after the act was executed. Marsoudet v. Jacobs, 276.

16. The act of 13th March, 1827, relative to bills of exchange and promissory notes, does not change the general commercial law in regard to the diligence to be used in serving notices of protest, but merely provides a new mode of proving such diligence. This law cannot be understood as pointing out the degree of diligence to be used. It merely instructs the notary how to proceed, where the endorser resides in another place than that of the protest, leaving him to ascertain where the notices are to be addressed.

Becnel v. Tournillon, 500.

17. A notice of protest simply directed to an endorser as in a particular parish, where there are several post offices in the parish, and the one at the seat of justice of the parish is not the nearest to his residence, is insufficient. Ib.

See *Evidence in actions on, infra*, 20, 21, 22, 23, 24, 25, 26.

VI. *Parties to actions on.*

18. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. Doll v. Theurer, 276.

VII. *Evidence in actions on.*

19. A note endorsed in blank may be considered as one payable to bearer, and all the endorsements posterior to that of the payee, may be stricken out on the trial. But in an action against the maker of a note, or the drawer or acceptor of a bill, all the endorsements stated in the petition, though unnecessarily, must be proved. Gaines v. Morris, 4.

20. Objections on the ground of informality, illegality, or falsehood to the protest of a bill or note, and to the certificate of the notary as to the manner in which notice was served or forwarded, go to the effect, and not to the admissibility of the evidence. Such objections cannot authorize its exclusion. The notice and certificate are *prima facie* evidence; if proved to be informal, false, or illegal, the court or jury will disregard them.

Marsoudet v. Jacobs, 276.

21. Where a defendant offers in evidence the original of a notarial protest, for the purpose of showing, that in the part which relates to the demand and notice, it contains erasures and interlineations, and that the copy introduced by the plaintiff was not conformable to the original as to these matters, he cannot move the court to reject that part of the original which relates to

the demand and notice. *Per Curiam.* The legal consequences of the want of demand and notice, is a question entirely different from that of the reception of evidence by which they are expected to be supported or disproved. Ib.

22. The statements of a notary, in the body of a protest, as to the demand of payment, and his certificate as to the manner of serving or forwarding notice, may be contradicted by parol. His statements and certificate are legal, but not conclusive evidence of what they contain. Act 13th March, 1827, sect. 1. Evidence to contradict them is admissible under a general denial of the allegations in the petition. Ib.

23. By the commercial law it is not indispensably necessary that the demand of payment of a promissory note, or inland bill of exchange, should be made, and the notice of non-payment given by a notary. Any person competent to testify as a witness, may do so; but the mode of proof is different in the two cases. Under the act of 13th March, 1827, sect. 1, the certificate of the notary is evidence of the demand and notice of protest; but when the demand is made, or notice given by a private individual, it must be strictly proved by the person making it, or by other competent testimony. Ib.

24. The acts of 14th February, 1821, and 13th March, 1827, authorizing notaries, and others acting as such, to demand payment of notes, bills of exchange, or orders for the payment of money, and to give notice of the protests thereof, and making their statements in the protest and certificates evidence of all that is contained in them, gives this authority to their official acts as sworn officers, and on the assumption that their acts and statements are under the sanction of their official oaths. They are expected to act themselves in making demands and giving notices. The duty cannot be delegated to others. They can only certify what they do or have done themselves, or what they know to be true of their own knowledge. The acts of 1821 and 1827 introduced no new rule as to the demand of payment and notice of protest of bills and notes, but only another mode of proving them. What will constitute legal demand and notice, depends on the general commercial law. Ib.

25. A party cannot prove by parol, a demand of payment of the drawer of a bill made by a private individual, and a notice of protest by the notary's certificate. The certificate can only be evidence of notice, when the notary makes the demand himself. Ib.

26. The first section of the act of 13th March, 1827, authorizing notaries or others acting as such, by a certificate added to the protest of a note, or bill, &c., to state the manner in which notices of protest were served or forwarded, and declaring that a certified copy of such certificate shall be evidence of all the matters therein stated, applies to acts done by the notary in his official capacity, and, therefore, within the territorial limits of his authority as such. But where an act was done by him, such as serving a notice of protest, in a parish in which he had no capacity to act, the same degree of faith and credit is not given to his written and unsworn statement. In such

a case he should be sworn and examined as an ordinary witness, as he must be considered to have acted unofficially, and not under his oath of office. Gordon v. Dreux, 399.

VIII. *Interest due on Protested Bills and Notes.*

27. The holder of a promissory note, protested for non-payment, is entitled to interest on the amount from the day of protest. Act 14th Feb. 1821, sect. 2. Mason v. Alexander, 166.

28. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. Ib.

See INTEREST, 4.

IX. *Payment.*

29. Where the holder of a note endorses on it that he has received from the maker four smaller notes, amounting together to the sum for which the first note was given, which, when paid, will be in full of the original note, he may sue on the latter, but to protect the defendant from the danger of suits by endorsees of the smaller notes, the judgment should provide that no execution be issued, nor the judgment itself be recorded by the Recorder of Mortgages, until the smaller notes are delivered to the defendant, or deposited for him in court. Rieder v. Theurer, 375.

CADDO INDIANS.

1. The Caddo tribe of Indians were never recognized as the proprietors of any lands, either by the Spanish or American governments. Brooks v. Norris, 175.

2. The Spanish government never acknowledged any primitive title in the Indian tribes to lands on this continent. Ib.

3. In the treaty between the United States and the Caddo Indians, of the 1st of July, 1835, that tribe were not treated with as the owners, but merely as the occupants of the territory, from which it was the object of the government to induce them to remove. Ib.

4. The provision in the first supplementary article to the treaty of 1835, between the United States and the Caddo Indians, relative to a reservation in favor of the heirs of François Grappe, is a mere confirmation of such grant as may have been made by that tribe in 1801, and not a substantive grant of so much land from the government. The recital by the Indians that they had made such a grant, is not conclusive upon the government. Ib.

CARRIERS.

1. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. Davis v. Houren, 255.

2. The master of a vessel is answerable for the baggage and effects of a passenger delivered to him, and not restored, nor accounted for.

Cosnier v. Golding, 297.

CITATION.

1. A single citation is sufficient where the defendants, sued as tutrix and co-tutor of certain minors, are husband and wife. C. P. 182. And when not separated from bed and board, its service on either will be good. Ib. 192.

Gaines v. Morris, 4.

2. A citation which mentions neither the title of the cause, the residence of the defendant, nor the place where the office is held, in which the defendant is cited to appear and file his answer, is insufficient. C. P. 179.

Caldwell v. Glenn, 9.

3. Knowledge of the existence of an action on the part of a defendant, no matter how clearly brought home to him, cannot supply the want of citation. Ib.

4. Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam.* The whole plantation was the domicil of the defendant, and service on a person living on it, was good. C. P. 189. Maxwell v. Collier, 86.

See Curator ad Hoc.

CLERK OF COURT.

1. Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record; and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. State v. Phelps, 308.

2. Where it is expressly denied that one, who styles himself the Clerk of a Court of Probates, by whom an adjudication of succession property was made, is, or was such, the certificate of the Judge of the court, at the foot of the *procès-verbal* of the sale drawn up by such Clerk, in which he styles himself the duly commissioned Clerk of the court, that the copy is a true one from the original on file in his office, is insufficient to establish his appointment, there being no general law authorizing Probate Judges to appoint Clerks to their courts. Rousseau v. Tête, 471.

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COMPENSATION.

1. A plaintiff on recovering a slave, will not be compelled to pay for the food and clothing of her children while in possession of defendant, where the value of her services was equivalent to any such expense. Allen v. Allen, 104.
2. Plaintiff having sued for the amount of a bill, for services, as a physician, rendered by him to defendant; the latter pleaded in compensation a note, for a larger amount, drawn by plaintiff to his order, held by him, and not

prescribed at the date of the services rendered: *Held*, that plaintiff's claim was extinguished by compensation. Arbonneaux v. Letorey, 456.

See BANK, 4. PLEADING, 17.

COMPROMISE.

Plaintiff having sued his lessee, levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount of the rent due to plaintiff by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam.* After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045. Millaudon v. Worsley, 274.

CONFLICT OF LAWS.

The 6th article of the act of the Legislature of Pennsylvania, of the 18th of February, 1836, incorporating the Bank of the United States, fixing the rate of discount at which loans may be made by the Bank, does not apply to contracts made by it in other States of the Union. The validity of such contracts must be tested by the laws of the place where they may have been entered into. Erwin v. Lowry, 28.

CONFUSION.

Where the creditor becomes the purchaser of property sold at her instance at a Sheriff's sale, subject to her mortgage and privilege as vendor, the debt secured by such mortgage and privilege is, *pro tanto*, extinguished by confusion. She cannot claim to have the price bid by her imputed to another debt, so as to affect the rights of other creditors.

Griffin v. His Creditors, 216.

CONSTITUTION.

1. The legislative authority has no power to fix, by a declaratory act, or otherwise, a construction of the constitution of the State, which shall be binding on the judicial department. If the courts occasionally rely upon legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, or modify them, or to settle their construction in cases of ambiguity, by a declaratory act.

Cotton v. Brien, 115.

2. The provision of the 17th sect. of the act of 10th February, 1841, which declares that the cases then pending before the District Court of the First District, and the Parish and Commercial Courts of New Orleans, "shall be stricken from the jury docket, unless the compensation fixed by that act to be allowed to jurors, be advanced by the party demanding a trial by jury," is not unconstitutional. *Per Curiam.* Under the twentieth section of the sixth article of the State Constitution no acquired rights, or existing contracts can be affected by subsequent legislation; but it is otherwise as to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio*,) is always within the control of the Legislature, which can, at any time, make any change, or modification it may think conducive to the public good and the proper administration of justice. Baldwin v. Bennett, 309.

See MISSISSIPPI, STATE OF.

CONTINUANCE.

It is within the discretion of the court, after the trial has commenced, to continue the case for the admission of further evidence.

Metoyer v. Larenandière, 139.

See EVIDENCE, 36.

CONTRACTS.

I. *Form of Executing, and Parties to Contracts.*
II. *Illegality or Nullity of Contracts.*
III. *Joint Contracts.*
IV. *Stipulations Pour Autrui.*
V. *Obligation of the Parties, and Damages for Non-Performance.*

I. *Form of Executing, and Parties to Contracts.*

1. From the moment that one to whom a proposition is made for a contract, refuses to confirm it, the offer is at an end; nor can it be revived by his subsequent assent. C. C. 1799. Such an offer must be accepted *in toto*, to render it obligatory. Wolf v. Rogers, 97.
2. A husband can contract with his wife only in the cases specially authorized by law. Doll v. Theurer, 276.
3. A subscriber for the stock of an incorporated company cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. He will be bound to pay the amount subscribed by him,

though books of subscription were not regularly opened according to the charter. Mexican Gulf Railway Company v. Viavant, 305.

4. Contracts are solemn, or ordinary. As the latter depend for their validity on the ascertained will of the parties, the formalities prescribed in relation to them are only *probationis causa*, and may be supplied by confirmation or ratification; while as to the former, the formalities required being *solemnitatis causa*, and essential to their validity and legal existence, cannot be supplied by any ratification, express or implied. Of this class are donations *inter vivos*. Packwood v. Dorsey, 329.

See Husband and Wife, 13, 15. Minor, 4, 5, 7.

II. *Illegality or Nullity of Contracts.*

5. The 6th article of the act of the Legislature of Pennsylvania, of the 18th of February, 1836, incorporating the Bank of the United States, fixing the rate of discount at which loans may be made by the Bank, does not apply to contracts made by it in other States of the Union. The validity of such contracts must be tested by the laws of the place where they may have been entered into. Erwin v. Lowry, 28.

6. Whatever is done in contravention of a prohibitory law is null and void, though no penalty be denounced by the law for its violation. So, of every act contrary to public policy. Their nullity is pronounced by the general principle of the law, and is applied by the courts as cases may arise. Cotton v. Brien, 115.

7. Where notes were given by defendant and another person, for a purchase made in violation of a prohibitory law rendering the transaction null and void, the substitution of a single note by defendant alone for a balance due after a part payment, will not bar the latter from pleading the illegality of the original contract. *Per Curiam.* The debt does not cease by the release of one of the original debtors, to be the same debt, growing out of the same transaction. Ib.

8. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1989. Hill v. Barlow, 142.

9. The nullity of the principal obligation involves that of the penal clause. C. C. 2119. Gorham v. Hayden, 450.

See Bills of Exchange and Promissory Notes, 9.

III. *Joint Contracts.*

10. In every suit on a joint contract, all the obligors must be made defendants, though some may have paid their proportion of the debt; and no judgment

can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080.

Bourgerol v. Allard, 351.

11. Where it is not proved that one of the defendants in an action to enforce a joint obligation, ever entered into it, there must be a judgment as in case of nonsuit. Ib.

IV. *Stipulations Pour Autrui.*

12. Plaintiff, a builder, having erected certain houses on lots belonging to the husband of the appellant and a third person, the wife intervened in a notarial act of settlement between the builder and her husband, and his co-proprietor, for the purpose of renouncing her legal mortgage on her husband's property. It was stipulated by the act, that certain notes should be given by the husband and his co-proprietor, for a balance of the price due to the builder, which were executed and identified with the act; and the builder's privilege was expressly reserved to the amount of the notes. The appellant having subsequently obtained a judgment of separation of property, ascertaining her rights, levied a *fi. fa.*, on all the property of the husband, and, among the rest, on his undivided half of the lots on which the buildings were erected. The whole was adjudicated to the appellant, who, in part payment of the price, assumed to pay the amount of the note sued on, *as due to the builder by privilege in his favor resulting from a building contract.* In an action against the wife for the amount of the note: *Held*, that though the debt originated in a contract of the husband's for improving his own property, the price of the property purchased at the Sheriff's sale, was the consideration for which she assumed to pay the debt, which was contracted for her private benefit (C. P. 683, 706, 707;) that the stipulation in the act was for the benefit of a third person, who, by the institution of the suit, consented to avail himself of the advantage stipulated in his favor (C. C. 1884. C. P. 35;) that plaintiff acquired under the stipulation, the right of exercising his privilege on the property subject thereto, and also of enforcing his claim against the appellant personally; and that there should be judgment for the plaintiff. Twichel v. Andry, 407.

13. An undertaker, having contracted with defendants to erect a building for them, employed plaintiff to furnish the materials for the roof, and to construct it. By a resolution, the defendants subsequently stipulated with the undertaker, that they should retain the cost of the roof out of the amount due to the undertaker, to be paid to plaintiff on the order of the undertaker. It was proved that defendants retained, at the date of the resolution, a sum sufficient to pay for the roof, and that it was not paid out in conformity to their stipulation, on the order of the undertaker. In an action by plaintiff for the cost of the roof: *Held*, that any payments made without the order of the undertaker, were irregular, and cannot prejudice plaintiff's right to recover. C. C. 2744. Judgment against defendants for the cost of the roof. Dumont v. Roman Catholic Church of Ascension, 532.

V. *Obligation of the Parties, and Damages for Non-Performance.*

14. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and the courts will lend their aid to carry the agreement into effect. C. C. 1928. *Aliter*, where the contract is to pay a sum of money. In such a case, no damages exceeding the highest rate of interest allowed by law, can be stipulated. The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to such damages, without proving any loss; and he can recover no more, no matter what loss he may have sustained. C. C. 1929.

Griffin v. His Creditors, 216.

15. Defendants having offered a reward of a certain sum, for the apprehension and conviction of any of the persons engaged in the circulation of certain counterfeit bills, plaintiff, who had arrested and procured the conviction of one of the persons, claimed the reward. Defendants refused to pay the amount on the ground that they had already paid the sum named to others who had undertaken to effect the arrest of some of the offenders, but who had not succeeded in convicting any. *Held*, that admitting that the defendants were bound to pay but one reward, the conviction, by the plaintiff's procurement, entitled him to it. Van Buren v. The Citizens' Bank of Louisiana, 379.

16. Where a party to a contract enters into a new agreement, by which the execution of the first is rendered impossible, the other party will be absolved from any penalty, for failing to comply with its provisions.

Gorham v. Hayden, 450.

See MEXICAN GULF RAILWAY COMPANY, 1.

COSTS.

Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record, and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. State v. Phelps, 308.

COURTS.

I. *Supreme Court.*
II. *District Courts.*
III. *Probate Courts.*

IV. *Parish Courts.*
V. *Commercial Court of New Orleans.*
VI. *Courts of the United States.*

I. *Supreme Court.*

See APPEAL. *Infra* 1, 4, 7, 8.

II. *District Courts.*

1. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. art. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. If the mandate of the Supreme Court be not obeyed, the party obtaining the judgment must enforce it by a *mandamus;* and he against whom it has been rendered, if he thinks himself injured by the manner in which the execution is ordered, must seek relief by a *supersedeas.*

Lovelace v. Taylor, 92.

III. *Probate Courts.*

2. Where a defendant in an action to recover a sum of money dies *pedente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P. 924. Thomas v. Cortes, 44.

3. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law

has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. Ib.

4. An order of seizure and sale cannot be obtained either from a state court, or a court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates.

Lowry v. Erwin, 192.

5. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,) against property belonging to such a succession. It wants jurisdiction, *ratione materiæ*. Such jurisdiction belongs exclusively to the Court of Probates.

Collier v. Stanbrough, 230.

6. The administrator of an estate is amenable, during his lifetime, to the Probate Court from which he derives his authority; but where he dies without having rendered an account, it can be rendered only in the Probate Court in which his own estate is being administered. But a claim of the person who afterwards became administrator against his intestate, acquired before he became administrator, must be prosecuted before the court in which the succession of the intestate was opened. Thomas v. Bourgeat, 435.

7. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

See Parish Judge. *Infra* 14.

IV. *Parish Courts.*

8. Though the Code of Practice (arts. 395, 397, 617, 629,) provides that the execution of a judgment belongs to the court which rendered it, and that an opposition, by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure; yet, where a plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership, a question is presented which no Parish Court, except that of the parish of Orleans, can try, the jurisdic-

tion of such courts being limited, (C. P. 128,) and no provision having been made for an appeal from their decisions to the Supreme Court. Such a case is, *ex necessitate rei*, an exception to the rules laid down for ordinary cases. Art. 397 must be considered as only applicable to those cases in which the value of the property seized is within the jurisdiction of the court issuing the execution; in other cases the opposition, or injunction, which the Code of Practice, (art. 398,) considers a separate demand, even when brought before the court which granted the order of seizure, must be taken into a court having jurisdiction, co-extensive with the right claimed.

Hagan v. Hart, 427.

See PARISH JUDGE.

V. *Commercial Court of New Orleans.*

9. The Commercial Court of New Orleans has no jurisdiction of an action to recover damages for an illegal seizure and sale of property. Act 14 March, 1839, sect. 3. The want of jurisdiction in such a case being *ratione materiæ*, the Judge is bound to notice it, though not pleaded by the defendant.

Greiner v. Thielen, 365.

VI. *Courts of the United States*

10. An affidavit to disprove one made by the opposite party, for the purpose of removing a case from a State Court to a Circuit Court of the United States, under the 12th section of the act of Congress of the 24th September, 1789, is inadmissible. The citizenship of the parties is a fact to be shown to the satisfaction of the court, and this showing is necessarily *ex parte*. The order of removal is not final; it is for the United States Court to decide ultimately upon its jurisdiction, which may remand the case to the State Court, should it think itself without jurisdiction.

Franciscus v. Surget, 33.

11. Under the grants of jurisdiction to the Circuit Courts of the United States, by the 11th section of the act of Congress of 24 September, 1789, those courts are of limited jurisdiction, having cognizance not of cases generally, but only of a few, under special circumstances; and the presumption is, not that a cause is within its jurisdiction unless the contrary appears, but that it is without it, unless the contrary be shown.

Lowry v. Erwin, 192.

12. A Circuit Court of the United States is without jurisdiction *ratione personæ*, of a suit between parties, all of whom reside out of the State in which the court is held. Ib.

13. The provision of the 11th section of the act of Congress of 24 Sept., 1789, "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature," &c., means that where a citizen of the state can sue in the state courts another citizen or resident, an alien, or a citizen of another state may institute a similar suit in the Circuit Court of the United States,

for a similar cause of action, and that he shall be entitled to the same remedy. Ib.

14. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor. Ib.

15. Local laws of the states can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of the parties, and thus assist in administering the proper remedies, where jurisdiction has been vested by the laws of the United States.

Collier v. Stanbrough, 230.

See BANKRUPTCY, 2, 3. JUDGMENT, 3. MARSHAL OF THE UNITED STATES IN LOUISIANA. *Supra* 4, 5.

CURATOR AD HOC.

1. Acceptance of service of citation by a curator *ad hoc* appointed to represent an absent defendant, will not interrupt prescription as to the latter. Art. 177 of the Code of Practice which provides for the waiver, or acknowledgment of service, in writing, under the signature of the defendant or his attorney, on the back of the original petition, does not apply to a curator *ad hoc*. Such waiver or acknowledgment can only be made by the defendant personally, or by the attorney whom he has employed. Hill v. Barlow, 142.

2. Service of a petition and citation upon a curator *ad hoc*, amounts to a notification of his appointment. The process must be regularly served, and until then he has no capacity to act; nor can he waive any of the legal proceedings required for the protection of the rights of the absentee he is called upon to defend. Ib.

3. The powers of a curator *ad hoc* must be strictly limited to those conferred by law. They cannot be extended to the performance of any other acts than such as tend to the defence of the rights and interests of the absentee whom he represents. He cannot waive, prospectively, on behalf of his client, the production of legal evidence; nor bind him by agreeing to dispense with the forms of law in taking it. He cannot surrender any lawful means of defence, to the injury of those he represents. Ib.

4. A curator *ad hoc*, may be appointed to represent an absent defendant in a petitory action, as in any other. Art. 116 of the Code of Practice, does not limit the right of appointment to any particular class of actions.
Beaumont v. Covington, 189.

5. Where a curator *ad hoc*, is a sworn attorney, he will be presumed to have done his duty. So, where a second curator *ad hoc* has been appointed, *pendente lite*, it will be presumed that the first appointment was vacated, by death, or otherwise. Ib.

DAMAGES.

Damages can be assessed only by a jury; and in suits before the District Court of the First District, or the Parish, or Commercial Courts of New Orleans, the plaintiff must advance the compensation allowed to the jurors by the 17th sect. of the act of 10th February, 1841, where the defendant has not done so. C. P. 313.
Liles v. New Orleans Canal and Banking Company, 273.

See APPEAL, 28. INJUNCTION, 2, 6. OFFENCES AND QUASI-OFFENCES.

DISMISSION OF ACTION.

See JUDGMENT, 11.

DISCONTINUANCE.

A plaintiff may discontinue his action, at any time before judgment has been rendered, on paying the costs. C. P. 491. But he has no right to call upon the court for a judgment of nonsuit. As a general rule, when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable, and which ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are to be left to the sound and legal discretion of the court, without any interference on the part of the parties. Crocker v. Turnstall, 354.

DOMICIL.

1. Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam.* The whole plantation was the domicil of the defendant, and service on a person living on it, was good. C. P. 189. Maxwell v. Collier, 86.

2. Articles 42, 43, 44 of the Civil Code, provide for a change of domicil only as to persons already residents of the state, and not as to those coming from other states. As to them, an actual residence of twelve months within the state, is required, before a domicil can be acquired. Lowry v. Erwin, 192.

DONATIONS INTER VIVOS.

1. A donation *inter vivos* of real estate, made while the Code of 1808, was in force, is null and void, unless executed before a Notary Public, and two witnesses, and accepted in express terms by the donee during the life of the donor. Book III. tit. II. arts. 53, 54. Packwood v. Dorsey, 329.

2. A donation *inter vivos* of real property, null for want of the formalities prescribed by law, cannot be ratified by any confirmative act on the part of the donor; nor will the voluntary execution of the donation by the donor, prevent him from pleading its nullity. Code of 1808, Book III. tit. III. art. 239. But the confirmation, ratification, or voluntary execution of such a donation by the heirs or assigns of a donor, after his death, will render it binding on them. Ib. art. 240. Ib.

3. Contracts are solemn, or ordinary. As the latter depend for their validity on the ascertained will of the parties, the formalities prescribed in relation to them are only *probationis causa*, and may be supplied by confirmation or ratification; while as to the former, the formalities required being *solemnitatis causa*, and essential to their validity and legal existence, cannot be supplied by any ratification, express or implied. Of this class are donations *inter vivos*. Ib.

DONATIONS MORTIS CAUSA.

1. The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of the Probate Court are not produced, nor alleged to have been mislaid, lost, or destroyed. Such evidence, though admitted without objection, would be insufficient to establish the will. Dash v. Dosson, 11.

2. It is not necessary that a testament made in another State should be executed according to the forms prescribed by our laws to have effect here. It is sufficient that it be clothed with all the formalities prescribed for its validity in the place where it was made, by the laws of which its form is to be governed. C. C. 1589. Jones v. Hunter, 235.

3. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to. Ib.

4. An omission to state, in the certificates appended to an exemplication of a will and of the probate thereof in another State, that the Judge who certifies to the correctness of the copy is *the presiding Judge*, is immaterial, where it is well known that the Probate Courts of that State are composed of but a single Judge. Act of Congress of 26th May, 1790. Ib.
5. Though a will, made in another State according to its laws, may have effect and be executed here, its dispositions or effect, where the property disposed of is situated here, must be governed by our laws—*lege rei sitæ*—not by the law of the place of its execution. C. C. 10, 483. Ib.
6. The acknowledgment of an illegitimate child in a will, is sufficient to entitle such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227. Ib.
7. Art. 1589, of the Civil Code, creates no exception to the rule, that the transmission of immoveable property situated in this State, whether by inheritance or testamentary disposition, must be according to our laws. Ib.
8. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. Ib. 1474. Ib.

EMANCIPATION OF SLAVES.

A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art. 3510 of the Civil Code; and that the prescription of ten years established by that article is not applicable to such a case.
Verdun v. Splane, 530.

ERROR.

1. In an action by the plaintiffs, as assignees of a prison-bounds bond, against the surety, parol evidence is admissible to prove a variance between the names of the assignees on the bond and those of the plaintiffs, to be but a clerical error. Guion v. Ford, 84.
2. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. Lovelace v. Taylor, 92.
3. Plaintiff having sued his lessee levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount

of the rent due to him by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam.* After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure, under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045. Millaudon v. Worsley, 274.

4. Where there was error on the part of the vendor in delivering, and on the part of the vendee in receiving the possession of property sold, such possession cannot serve as a basis for the prescription of ten years; as where lands resold by a purchaser from the United States, having been erroneously located, the possession in conformity thereto was necessarily erroneous.

Kittridge v. Landry, 477.

See AGENCY, 12. CONTRACTS, 3. EVIDENCE, 23. EXPERTS, 2.

EVIDENCE.

I. *Onus Probandi.*
II. *Presumption.*
III. *Interest of Witness.*
IV. *Examination of Witness.*
V. *Commission to take Testimony.*
VI. *Judicial Records and Proceedings, and Copies thereof.*
VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
VIII. *Admissibility of Parol Evidence to show Clerical Errors, or to Explain, Alter or Destroy, Written Instruments.*
IX. *Admissibility of Evidence under the Pleadings.*
X. *Secondary Evidence.*
XI. *Evidence of Particular Persons.*
1. *Parties.*
2. *Agents.*
XII. *Evidence in Particular Actions.*
1. *In Actions for Assault and Battery.*
2. *In Actions on Bills of Exchange and Promissory Notes.*
3. *In Suits for Freedom.*
4. *In Actions on Joint Contracts.*
5. *In Petitory and Possessory Actions.*
6. *In Actions for Separation from Bed and Board, and of Property.*
7. *In Actions for the Settlement of the Community of Gains.*
8. *In Proceedings Via Executiva.*

I. *Onus Probandi.*

1. Where on an application for a monition under the act of 10th March, 1834, by a purchaser at a Sheriff's sale, for the purpose of confirming his title to the property purchased, it is alleged by the party opposing the homologation of the sale, that the previous advertisements required by law were not made, the *onus probandi* is on the petitioner. They are essential to the validity of the sale, and must be proved when denied. Ex parte Murray, 74.

2. Where in an action on a note, defendant claimed credit for a sum proved to have been paid to plaintiff, but the latter alleged that the payment was made in discharge of another debt: *Held*, that it was for the plaintiff to show that he was the holder of another obligation, which had been, or ought to have been credited with the amount. Mann v. Major, 475.

II. *Presumption.*

3. The husband being the head and master of the community, all contracts entered into during the marriage, must be considered as made by him, and for his advantage, whether made in his own name, or in the names of both husband and wife. C. C. 2371, 2372, 2373. This presumption can only be destroyed by positive proof that the consideration of the contract enured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself, cannot avail the creditor.

Prudhomme v. Edens, 64.

4. Where a curator *ad hoc*, is a sworn attorney, he will be presumed to have done his duty. So where a second curator *ad hoc*, has been appointed, *pendente lite*, it will be presumed that the first appointment was vacated, by death or otherwise. Beaumont v. Covington, 189.

5. By the common law the assent of creditors will be presumed, in case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated by the debtor, and the property is to be distributed among all the creditors *pro rata*. This assent is presumed on the ground, that the trust must be for their benefit.

Fellows v. Commercial and Rail Road Bank of Vicksburg, 246.

6. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. Mary v. Lampré, 314.

7. The law raises no presumption of fraud from the fact that the vendor and vendee were brothers-in-law. Allard v. Allard, 320.

See INSOLVENT, 12.

III. *Interest of Witness.*

8. An objection to a witness on the ground that a suit was pending against him, by the same plaintiff, for other tracts of land, claimed under the same

title, and that he had set up the same defence, goes to his credibility, and not to his competency, he being interested in the question, but not in the case. Brooks v. Norris, 175.

9. Objections to a verdict and judgment, on the ground that one of the witnesses was interested, cannot avail a party to the action, who did not appear at the trial, and object to the witness; nor would such an objection support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision on such grounds. Cressap v. Winchester, 458.

IV. *Examination of Witness.*

10. Where a witness has not been interrogated in the inferior court as to his means of knowing a signature to which he testified, no objection to the want of a disclosure of such means, can avail after appeal.
Berryman v. Dahlgren, 188.

11. Evidence taken in an action against the owners of a steamer, for an injury done to a vessel of plaintiffs by the steamer of the defendants, to which action the captain of the steamer is not a party, is not binding on him.
Davis v. Houren, 255.

V. *Commission to take Testimony.*

12. The deposition of a witness must be reduced to writing by himself, by a magistrate, or by an indifferent person. It is inadmissible, if drawn up in the hand-writing of the party, or of his counsel.
Union Bank of Louisiana v. Lamothe, 5.

VI. *Judicial Records and Proceedings, and Copies thereof.*

13. The *procès-verbal* of the adjudication of property sold by a Court of Probates is evidence of the sale, and no act under the signatures of the parties, is necessary to perfect it. Faulk v. Pennell, 26.

14. A copy of a decree of a District Court of the United States sitting in Bankruptcy, certified under the signature of the Clerk, appointing an assignee to the estate of a bankrupt, and ordering him to give security in a certain sum for the faithful discharge of his duties, is sufficient evidence of the authority of the person so appointed to sue as assignee, where the exception does not state the grounds on which plaintiff's capacity is denied. It will not be presumed that the certificate was delivered, before the person so appointed had complied with the orders of the court.
Faures v. Metoyer, 75.

15. The return of the Sheriff on a *fieri facias* is not conclusive as to the facts stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the contents of the return, that the formalities required by law for the validity of Sheriff's sales had been complied with, and how they were fulfilled.
Succession of Goodrich, 107

16. One claiming under a Sheriff's sale who produces the judgment, execution, and Sheriff's return, showing the adjudication to him, has nothing else to show in support of his title. It is for the opposite party to establish any irregularity or informality in the sale. Ib.

17. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to. Jones v. Hunter, 235.

18. An omission to state, in the certificates appended to an exemplification of a will and of the probate thereof in another State, that the Judge who certifies to the correctness of the copy is *the Presiding Judge*, is immaterial, where it is well known that the Probate Courts of that State are composed of but a single Judge. Act of Congress of 26th May, 1790. Ib.

19. An adjudication of succession property made and recorded by a Clerk of a Court of Probates legally appointed, is, of itself, a complete title. C. C. 2601. Rousseau v. Tête, 471.

20. Where it is expressly denied that one, who styles himself the Clerk of a Court of Probates, by whom an adjudication of succession property was made, is, or was such, the certificate of the Judge of the court, at the foot of the *procès verbal* of the sale drawn up by such Clerk, in which he styles himself the duly commissioned Clerk of the Court, that the copy is a true one from the original on file in his office, is insufficient to establish his appointment, there being no general law authorizing Probate Judges to appoint Clerks to their courts. Ib.

21. Where experts, appointed by the Court, are not shown to have been sworn, and their report does not appear to have been homologated, it may be contradicted by other evidence. Mooney v. Cage, 494.

VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

22. Cases which would be decided according to the laws of another State if in evidence, must, in the absence of proof of those laws, be governed by our own. Stone v. Minor, 29.

23. A patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud. Carter v. Monetti, 82.

24. An admission in a treaty between the United States and a tribe of Indians, as to the limits of the territory occupied by the latter, is only binding on the government, and those claiming under it after the date of the treaty; it is not conclusive on those who had previously acquired rights. The latter may go behind the treaty, and show that the whole proceeding was, as to them, fraudulent and void. Brooks v. Norris, 175.

25. A receipt from the Receiver of Public Moneys for the price of lands pur-

chased from the United States, is sufficient evidence of title to enable the purchaser to maintain an action. Beaumont v. Covington, 189.

26. The decisions of the Register of the Land Office and Receiver of Public Moneys in Louisiana, in relation to confirmed land claims which may conflict or interfere with each other, under the powers conferred by the sixth section of the act of Congress of 3d March, 1831, are not binding on the parties. The act does not take from the courts the right of investigating and deciding on such claims, after those officers have acted thereon.

Terrell v. Chambers, 243.

VIII. *Admissibility of Parol Evidence to show Clerical Errors, or to Explain, Alter or Destroy, Written Instruments.*

27. In an action by the plaintiffs, as assignees of a prison-bounds bond, against the surety, parol evidence is admissible to prove a variance between the names of the assignees on the bond and those of the plaintiffs, to be but a clerical error. Guion v. Ford, 84.

28. The stipulations in a contract of sale, by authentic act, cannot, between the parties or their representatives, be destroyed or weakened by parol evidence. Nothing but a counter-letter can have that effect.

Citizens Bank of Louisiana v. Tucker, 443.

29. Defendant, in answer to an action on his note, averred that plaintiff had received a certain other note to be collected from the endorser thereof, and the proceeds applied to the payment of the note sued on; that he had neglected to protest the note so given, thereby discharging the endorser; and that the amount of this note should be considered as so much paid towards the note sued on. Defendant annexed to his answer plaintiff's receipt, which stated that he had received the note "*à recouvrir contre P. J.*" the endorser. Defendant having offered witnesses to prove that the note received by plaintiff was given in final discharge of the note sued on, the evidence was excluded below, on the ground that it was inconsistent with the receipt annexed to the answer. On appeal: *Held*, that the evidence should have been received. Mann v. Major, 475.

See 15 *Supra.*

IX. *Admissibility of Evidence under the Pleadings.*

30. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367. Maxwell v. Collier, 86.

X. *Secondary Evidence.*

31. The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of

the Probate Court are not produced, nor alleged to have been mislaid, lost, or destroyed. Such evidence, though admitted without objection, would be insufficient to establish the will. Dash v. Dosson, 11.

32. Recognitive acts do not exempt the party offering them from the necessity of producing the primordial title, unless its tenor be therein specially set forth. C. C. 2251. Brooks v. Norris, 175.

33. Recognitive acts are either *ex certa scientia* or *in forma communi*. The former said to be *in forma speciali et dispositiva*, are those in which the primordial title is set forth: they are equivalent to the original title in the event of its loss, and prove its existence against the person making it, dispensing with its production. Recognitive acts *in forma communi*, are those in which the tenor of the primordial title is not set forth, serving only to confirm it so far as it is true, and to interrupt prescription; they do not prove its existence, nor dispense with its production. Ib.

33. By the common law, where the recital of a deed points to higher evidence in the power of the party, the withholding of which creates suspicion of fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him. Ib.

34. On an application for a mandamus to compel the erasure of the mortgages existing on property sold by order of a Probate Court, the declaration of the applicant is not the best evidence of the sale; the *procès-verbal* of the sale and adjudication should have been produced.

French v. Prieur, 299.

XI. *Evidence of Particular Persons.*

1. *Parties.*

35. Where a party to whom interrogatories have been propounded, states facts not closely connected with those as to which he has been questioned, the opposite party should move to strike out such irrelevant matter.

Wells v. Hickman, 1.

36. Where a defendant, after having obtained several continuances, moves for leave to file an amended answer propounding interrogatories to the plaintiff, a resident of another State, evidently merely for delay, permission will be refused. Yeatman v. Henderson, 81.

37. Under art. 351 of the Code of Practice, a party to an action to whom interrogatories are propounded can be required to answer, in open court, only when he resides in the parish where the court sits. Where his residence is out of the parish, but within the State, it is the duty of the party propounding the interrogatories to obtain from the court a commission directed to some Judge, or Justice oft he Peace, in the parish in which the party interrogated resides, to receive his answers; or the interrogatories, if unanswered, cannot be taken *pro confessis*. C. P. 352.

Crocker v. Turnstall, 354.

38. Defendant claimed to be the owner of a slave under a notarial act of sale, executed to him on the 26th of March. Plaintiff, cited in warranty as the

representative of the alleged vendor, offered in evidence a letter from the defendant to the latter, dated in that month, the day not mentioned, in which, after stating that he has not title to a sufficient number of negroes to obtain a loan which he desired, he requests the alleged vendor "*to send him an act of sale for the slave*" sued for "*for the present.*" *Held*, that this was a counter-letter, showing that there was no sale as between the parties.

Cox v. Camp, 425.

39. A verbal sale of a slave is good against the vendor, only when acknowledged by him, under oath, in answer to interrogatories, and where there was actual delivery of the slave. C. C. 2255. Where the answer denies the sale, it cannot be contradicted by the evidence of witnesses. Ib. 2415. Were it permitted, the prohibition of the law as to testimonial proof of verbal sales of real estate, or slaves, would be evaded, by alleging fraud, and propounding interrogatories, and, when answered in the negative, by offering testimony under the pretence of contradicting the answers.

Haydel v. Betts, 428.

2. *Agents.*

40. An account rendered by an agent to his principal is conclusive against the former, unless he show clearly errors or omissions to his prejudice.

Mornay v. Bordelais, 318.

XII. *In Particular Actions.*

1. *In Actions for Assault and Battery.*

41. In answer to an action for an assault and battery, defendant alleged that plaintiff had been assaulted in consequence of having attempted to excite defendant's slaves to insurrection. Defendant offered to prove that, immediately before the assault, he (defendant) had "said, that he had been told by a person, who had heard it from a slave, that plaintiff was endeavoring to induce defendant's negroes to run away." On objection: *Held*, that the evidence was inadmissible. Gardiner v. Cross, 454.

42. In an action for damages, for an assault and battery and slander, evidence as to the plaintiff's character is inadmissible, even in mitigation of damages. Ib.

2. *In Actions on Bills of Exchange and Promissory Notes.*

See Bills of Exchange and Promissory Notes, 7, 15, 19 to 26.

3. *In Suits for Freedom.*

43. A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art. 3510 of the Civil Code; and that the pre-

scription of ten years established by that article is not applicable to such a case, Verdun v. Splane, 530.

4. *In Actions on Joint Contracts.*

44. Where it is not proved that one of the defendants in an action to enforce a joint obligation, ever entered into it, there must be a judgment as in case of nonsuit. Bourgerol v. Allard, 351.

5. *In Petitory and Possessory Actions.*

45. The evidence of a single witness is sufficient to prove permission to a third person to settle upon land belonging to a party.
Metoyer v. Larenandière, 139.

46. Parol evidence is inadmissible to prove that plaintiff was the owner of the land in dispute, and leased it to the defendant, and that the latter committed a fraud in converting it to his possession. It would tend to make out a title to real estate by parol. Ib.

6. *In Actions for Separation from Bed and Board, and of Property.*

47. *Prima facie* evidence of the claims of the wife is not sufficient to authorize her to obtain a judgment against her husband, when those claims are to be settled and liquidated contradictorily with the creditors of the husband, or third persons, as to whom the proof must be conclusive. She must show that money alleged to have been received by him, was paid into his hands, or converted to his individual use. C. C. 2367.
Oliver v. Her Husband, 36.

48. A reconciliation between a husband and wife, after the facts which might have authorized a suit for separation, is a bar to such an action. C. C. 149. Nor can this provision be evaded by praying for a divorce, or a separation *a mensa et thoro*, by way of reconvention. To succeed in such a demand, sufficient legal cause for a separation must be shown to have occurred since the reconciliation. C. v. E., 135.

7. *In Actions for the Settlement of the Community of Gains.*

49. All the effects which the spouses reciprocally possess at the time of the dissolution of the marriage, are presumed to be common effects or gains, unless they satisfactorily prove which of such effects they brought into marriage, or have been given to them separately, or they have respectively inherited. C. C. 2374. Babin v. Nolan, 508.

50. Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, when there is no evidence that the community was benefitted by it, or that it was used in the purchase of community property. Ib.

8. *In Proceedings Via Executiva.*

51. The *procès-verbal* of a sale, made by a Parish Judge, by which a mortgage

is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès-verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733. Faulk v. Pinnell, 96.

EXECUTION.

1. Art. 624, of the Code of Practice, which declares, that one, in whose favor a judgment has been rendered which is subject to appeal, cannot take out execution until ten days shall have elapsed, counting from the notification to the opposite party, must be construed in connection with art. 575, of the same Code, and be understood as excluding Sundays from the ten days. It could not have been intended to allow an execution, so long as the defendant is entitled to a suspensive appeal.
Dayton v. Commercial Bank of Natchez, 17.

2. An injunction against an execution prematurely issued, will not be perpetuated where the creditor will be entitled to take out another execution as soon as the injunction against the first is perpetuated. All that the injured party can expect is, to be relieved from the payment of costs and damages, having had the benefit of all the delay to which he was entitled. Ib.

3. Where an execution has been unlawfully issued, every thing done under it, is null and void. Holmes v. Hemken, 51.

4. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. art. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. Lovelace v. Taylor, 92.

5. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *fieri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762. Winn v. Elgee, 100.

6. The return of the Sheriff on a *fieri facias* is not conclusive as to the facts stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the

contents of the return, that the formalities required by law for the validity of Sheriffs' sales had been complied with, and how they were fulfilled.

Succession of Goodrich, 107.

7. Dowry being the effects which the wife brings to the husband to support the expenses of the marriage, (C. C. 2317,) the income from it, though belonging to the husband, is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, &c. Ib. 2329. Such income cannot be seized under execution, or made liable to the payment of debts, the object of the law being to secure to the family, under any circumstances, the means of existence. The act of 22d March, 1842, chap. 128, which provides that the Sheriff shall in no case seize the income of dotal property, was merely declaratory of the law previously in force. Buard v. De Russy, 111.

8. If the goods of one who has been declared a bankrupt under the act of 1841, be seized in execution and sold, before possession has been taken by the assignee, they may be recovered in an action against the Sheriff, or the plaintiff in execution, if he accompanied the Sheriff, or specially directed the seizure. Lewis v. Fisk, 159.

9. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor.

Lowry v. Erwin, 192.

10. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Collier v. Stanbrough, 230.

11. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722.

Caseaux v. His Creditors, 268.

12. A seizure under a *fi. fa.*, "of any money," which the party in whose

hands the seizure was made, "has now or may hereafter have in virtue of his office of judicial sequestrator," will not, as against other creditors of the debtor whose property was sequestered, embrace any funds not, at the time, in the hands of the sequestrator. *Per Curiam.* A sum of money which may or may not be received, without any specification of amount, even by conjecture or approximation, is a thing too vague to form the object of a seizure. Murphy v. Thielen, 288.

13. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. Mary v. Lampré, 314.

14. Plaintiff having a judgment against defendants as commercial partners, seized under a *fi. fa.*, a judgment obtained in a court of original jurisdiction by two of the partners against the third in an action for a settlement of the partnership. One of the partners, who had been appointed a receiver in the last suit, having, as receiver, enjoined the *fi. fa.*, deposited a sum of money in court to represent the bond and surety required for the injunction. The judgment seized being reversed on appeal, the injunction was discontinued without objection on the part of the plaintiff, who, under a second *fi. fa.* seized the money deposited in court, and took a rule on the defendants to show cause why it should not be paid to him towards the satisfaction of his execution. *Held*, that the rule should be discharged; that, had a bond been executed, it ought to have been signed by the party as receiver; that the deposit was in lieu of it; that, unless the contrary be shown, it must be presumed that the money deposited was in the party's hands as receiver; that, as such, he was an officer of the court below, in the nature of a judicial sequestrator, and bound to account to it for all the funds coming into his hands; and that the court from which the *fi. fa.* was issued, had no power to withdraw the funds from the control of the court in whose custody they were.
Nelson v. Conner, 339.

15. Where the return on a *fi. fa.* states, that it was levied on the proceeds of the sale of certain slaves seized and advertised to be sold at a future day, at the suit of another party, the plaintiff in the execution will acquire no privilege entitling him to be paid by preference, out of the proceeds. *Per Curiam.* The slaves themselves were not seized, and the proceeds of the sale were not in existence at the time, and could not, therefore, be taken possession of. To entitle a seizing creditor to the privilege conferred by arts. 722, 723 of the Code of Practice, the thing seized must be taken possession of by the officer; otherwise, there is no seizure.
Goubeau v. New Orleans and Nashville Rail Road Company, 345.

16. Defendants, in the absence of plaintiff, seized under a *fi. fa.* against a third person, furniture belonging to the plaintiff, and sold it. The plaintiff's landlord afterwards claimed and received the proceeds, in virtue of his privilege on the furniture for rent. In an action for the value of the furniture against

the Sheriff and the seizing creditors, there was a judgment for the defendants. On appeal: *Held*, that the court below erred; that it is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, that they gained nothing by them, and that another got the money they were endeavoring to obtain; that the course pursued by the defendants compelled the landlord to assert his claim, and that it is not shown that he would, in the absence of the plaintiff, have taken any step to have the furniture sold. Case remanded. Lawrence v. Hozey, 385.

See SALE, VII.

EXECUTORY PROCESS.

1. The *procès-verbal* of a sale, made by a Parish Judge, by which a mortgage is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès-verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733. Faulk v. Pinnell, 26.
2. The holder of a note secured by mortgage, signed by one since deceased, cannot obtain an order of seizure and sale. He is only entitled to a judgment to be paid *in concurso*, according to his rank relatively to the other creditors, and in the due course of administration. Erwin v. Lowry, 28.
3. A judgment rendered against one in another State, in an action in which the defendant, after having pleaded, withdrew his plea, is not a judgment by default, in the meaning of art. 747, of the Code of Practice, and an order of seizure and sale may be issued thereon. A judgment by default, according to the laws of this State, takes place only where the defendant has neither appeared, nor answered. Stone v. Minor, 29.
4. The clause *de non alienando* in an act of mortgage, relieves the mortgagee from the necessity of pursuing all the steps required in an hypothecary action in ordinary cases. Dodd v. Crain, 58.
5. On an appeal from an order of seizure and sale, the only question is, whether the Judge had sufficient evidence before him to authorize his *fiat*. Such an order cannot be set aside on account of subsequent irregularities in the execution of it, as not notifying the proper parties, &c. Redress must be sought by other proceedings. Ib.
6. Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action. Maxwell v. Collier, 86.
7. Executory process by seizure and sale, is a summary and severe remedy, and the formalities prescribed by law must be strictly complied with, or the property will not be transferred, and the purchaser acquire no title. Lowry v. Erwin, 192.

8. To support a sale by a Sheriff or Marshal, under an order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. Ib.

9. An order of seizure and sale cannot be obtained either from a state court, or a court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates. Ib.

10. Until the notice required by art. 735 of the Code of Practice to be given to a debtor, on an application for an order of seizure and sale against mortgaged property, has been given, and the time has elapsed, the order directing the seizure is not a final judgment, and no executory proceedings can be had under it. Ib.

11. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,) against property belonging to such a succession. It wants jurisdiction, *ratione materiæ*. Such jurisdiction belongs exclusively to the Court of Probates.

Collier v. Stanbrough, 230.

12. A third possessor, personally liable for the debt, is not entitled to the exceptions which one not so bound, might oppose to the creditor's hypothecary action, and cannot relinquish the property mortgaged. C. C. 3366, 3368. Twichel v. Andry, 407.

13. Though but one instalment of a debt secured by a mortgage by authentic act, be due, an order of seizure and sale may be obtained for the whole amount of the debt, but the sale must be on terms of credit corresponding with the periods at which the remaining instalments fall due.

Robinson v. Aubert, 461.

EXPERTS.

1. Where experts, appointed by the Court, are not shown to have been sworn, and their report does not appear to have been homologated, it may be contradicted by other evidence. Mooney v. Cage, 494.

2. A court, by which experts have been appointed, is not bound to adopt their report. Any error in it may be corrected; another report may be ordered; or, rejecting the report altogether, the court may adopt any conclusion which the evidence, adduced contradictorily by the parties before the experts, or before the court, may warrant and justice require. C. P. 442, 451, 458, 461. Babin v. Nolan, 508.

FIERI FACIAS.

See Execution. Sale, VII.

FOREIGN LAWS.

1. Cases which would be decided according to the laws of another State, if in evidence, must, in the absence of proof of those laws, be governed by our own. Stone v. Minor, 29.—Allen v. Allen, 104.
2. Questions which concern our own citizens, although growing out of the constitutional or legislative provisions of another State, will be regarded as new ones, where there is a conflict between the tribunals of the State and of the United States as to their proper construction.

Cotton v. Brian, 115.

FRAUD.

See Contracts, 3. Evidence, 7, 23. Insolvency, 9.

HOLY THINGS.

See Sacred Things.

HUSBAND AND WIFE.

I. *Laws regulating Rights of Husband and Wife.*
II. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
III. *Community of Gains.*
IV. *Contracts of the Wife.*
V. *Authorization to Sue or be Sued, and Citation of Married Woman.*
VI. *Separation of Property.*
VII. *Separation from Bed and Board, and Divorce.*

I. *Laws regulating Rights of Husband and Wife.*

1. The rights of married persons are not to be regulated by the laws of the State in which the marriage is celebrated, when it appears that it was their intention to remove immediately, and fix their residence in another country.

Allen v. Allen, 104.

II. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*

2. The paraphernal property of a married woman is presumed by law to be

under the management of her husband, unless administered by her separately and alone. C. C. 2361, 2362. Pinckney v. Mulhollan, 41.

3. The property which a wife inherits during marriage, is, according to the laws of this State, separate and paraphernal. Allen v. Allen, 104.

4. Dowry being the effects which the wife brings to the husband to support the expenses of the marriage, (C. C. 2317,) the income from it, though belonging to the husband, is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, &c. Ib. 2329. Such income cannot be seized under execution, or made liable to the payment of debts, the object of the law being to secure to the family, under any circumstances, the means of existence. The act of 22d March, 1842, chap. 128, which provides that the Sheriff shall in no case seize the income of dotal property, was merely declaratory of the law previously in force. Buard v. De Russy, 111.

5. The words "*or otherwise disposed of the same*," in art. 2367, of the Civil Code, apply not to the price of the paraphernal property sold by the wife, but to the property itself, or its value, when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. The legal mortgage given to the wife, by that article, on all the property of her husband for the reimbursement of the value of her paraphernal property, is not confined to the case of the sale of the property, but extends to all cases where the husband receives money for his wife or disposes of her property in any way for his individual benefit, and it attaches from the moment of such receipt or conversion. Compton v. Her Husband, 170.

6. Though the wife has a right to adminster personally her paraphernal property, without the authorization of her husband, and, even where she has left its administration to him, may resume it at any time, yet if, during his administration, he has sold any part of it, she has, under art. 2367, a mortgage on his property for its value. Ib.

III. *Community of Gains.*

7. The husband being the head and master of the community, all contracts entered into during the marriage, must be considered as made by him, and for his advantage, whether made in his own name, or in the names of both husband and wife. C. C. 2371, 2372, 2373. This presumption can only be destroyed by positive proof that the consideration of the contract enured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself, cannot avail the creditor.

Prudhomme v. Edens, 64.

8. A surviving wife who has omitted to cause an inventory to be made of the effects left by her husband, however inconsiderable, in the manner prescribed for beneficiary heirs, cannot renounce the community. It is not enough that she present a petition to the Probate Court, praying that an inventory may be made; she must see that it is done. C. C. 2379, 2380, 2381, 2382. She is bound to point out to the Judge all the effects of the community, the

concealment or making away with any part of which, will render her incapable of renouncing. Ib. 2387. Chapman v. Kimball, 94.

9. All the effects which the spouses reciprocally possess at the time of the dissolution of the marriage, are presumed to be common effects or gains unless they satisfactorily prove which of such effects they brought into marriage, or have been given to them separately, or they have respectively inherited. C. C. 2374. Babin v. Nolan, 508.

10. To ascertain, after the dissolution of a matrimonial community, the increase or improvements in the value of the hereditary property of either of the spouses, during the marriage, from the common labor or expense, the proper course is, to estimate the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements existing thereon, at the time of such dissolution; and the difference between the two estimates will form the increased or improved value, to one-half of which the other spouse will be entitled, on the settlement of the community. C. C. 2377. Ib.

11. Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, where there is no evidence that the community was benefitted by it, or that it was used in the purchase of community property. Ib.

12. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals. Ib.

IV. *Contracts of the Wife.*

13. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. Doll v. Theurer, 276.

14. A husband can contract with his wife only in the cases specially authorized by law. Ib.

15. Where a wife is a public merchant carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. C. C. 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. C. C. 2675, 2676, 2677. Deslix v. Jone, 292.

See CONTRACTS, 12.

V. *Authorization to Sue or be Sued, and Citation of a Married Woman.*

16. A single citation is sufficient where the defendants, sued as tutrix and co-tutor of certain minors, are husband and wife. C. P. 182. And when not separated from bed and board, its service on either will be good. Ib. 192.

Gaines v. Morris, 4.

17. A married woman, not separated from bed and board, cannot sue or be sued, without the authorization of her husband, or that of the Judge before whom the suit is brought. Nor can she appeal from a judgment rendered against her, without having been so authorized.

Cuny v. Dudley, 177.

18. The omission of a plaintiff in an action against a married woman, to cause her to be authorized, either by her husband or the court, to defend the suit, rendering the proceedings absolutely null, will be noticed by the court, though it escape the attention of the parties. In such a case the judgment may be reversed, and the case remanded to enable the plaintiff to have the opposite party legally authorized to defend the action.

Robinson v. Butler, 78.

19. The insolvency of a husband, who has made a surrender of his property, does not deprive him of his marital power of appearing in court to assist his wife, nor prevent his being made a defendant for that purpose. C. P. 118.

Twichel v. Andry, 407.

VI. *Separation of Property.*

20. *Prima facie* evidence of the claims of the wife is not sufficient to authorize her to obtain a judgment against her husband, when those claims are to be settled and liquidated contradictorily with the creditors of the husband, or third persons, as to whom the proof must be conclusive. She must show that money alleged to have been received by him, was paid into his hands, or converted to his individual use. C. C. 2367.

Oliver v. Her Husband, 36.

21. Any creditor of the husband who alleges, that he has been aggrieved by a judgment for a separation of property between the spouses, may appeal therefrom, though not a party to the suit in the lower court. C. P. 571. C. C. 2408. Compton v. Her Husband, 170.

22. A wife may obtain a separation of property, though she brought no dowry in marriage, and have no actual rights or claims against her husband, which can be endangered by the disorder of his affairs, where the habits or circumstances of her husband render it necessary to preserve for her family the earnings she may afterwards derive from her industry or talents. Her right to a separation is not limited to the cases mentioned in art. 2399 of the Civil Code. Davock v. Darcy, 342.

23. A judgment for a separation of property between a husband and wife, is retroactive as far back as the day on which the petition was filed. C. C.

2406. The community of *acquêts* is dissolved from that time; and purchases made by the wife between the date of the demand and that of the judgment of separation, must be viewed as made on her own account.

Dugas v. Her Husband, 527.

VII. *Separation from Bed and Board, and Divorce.*

24. A reconciliation between a husband and wife, after the facts which might have authorized a suit for separation, is a bar to such an action. C. C. 149. Nor can this provision be evaded by praying for a divorce, or a separation *a mensa et thoro*, by way of reconvention. To succeed in such a demand, sufficient legal cause for a separation must be shown to have occurred since the reconciliation. C. v. E., 135.

25. A wife, proved to have been guilty of adultery, cannot claim, on her part, a divorce from her husband, on account of his having killed the man with whom the act was committed. The provision of the act of 2d April, 1832, sect. 1, which declares "that whenever a husband or wife charged with an infamous offence, shall actually have fled from justice and gone beyond the jurisdiction of the State, the husband or wife of such fugitive may claim a divorce, on producing proof to the Judge who tries the petition for divorce, that his or her husband or wife has actually been guilty of such infamous offence, and has so fled from justice," never contemplated such a case. Ib.

26. A husband who obtained a divorce on account of adultery on the part of his wife, entrusted with the custody of the issue of the marriage. Ib.

IMMOVEABLES.

See MOVEABLES.

INDIAN TRIBES.

The Spanish government never acknowledged any primitive title in the Indian tribes to lands on this continent. Brooks v. Norris, 175.

See CADDO INDIANS.

INJUNCTION.

1. Where defendant is in possession of a judgment for a certain sum, payable in specie, from which no appeal has been taken, an allegation by the party against whom it was rendered, that, by the original contract, he was entitled to discharge the debt in the notes of a particular bank, cannot be inquired into on an application to enjoin the execution. Such a defence should have been urged in the original suit in which the judgment was rendered, under which the execution was issued.

Dayton v. Commercial Bank of Natchez, 17.

2. An injunction against an execution, prematurely issued, will not be perpetuated where the creditor will be entitled to take out another execution as soon as the injunction against the first is perpetuated. All that the injured party can expect is, to be relieved from the payment of costs and damages, having had the benefit of all the delay to which he was entitled. Ib.

3. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3d March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal. McLean v. Carroll, 43.

4. It is not necessary that a Parish Judge, in granting an injunction in the absence of the District Judge, should direct in his order into what court it is to be made returnable. It is the duty of the clerk to issue the writ according to law. Hagan v. Hart, 427.

5. Though the Code of Practice (arts. 395, 397, 617, 629,) provides that the execution of a judgment belongs to the court which rendered it, and that an opposition, by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure; yet, where a plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership, a question is presented which no Parish Court, except that of the parish of Orleans, can try, the jurisdiction of such courts being limited, (C. P. 128,) and no provision having been made for an appeal from their decisions to the Supreme Court. Such a case is, *ex necessitate rei*, an exception to the rules laid down for ordinary cases. Art. 397 must be considered as only applicable to those cases in which the value of the property seized is within the jurisdiction of the court issuing the execution; in other cases the opposition, or injunction, which the Code of Practice, (art. 398,) considers a separate demand, even when brought before the court which granted the order of seizure, must be taken into a court having jurisdiction co-extensive with the right claimed. Ib.

6. An order of seizure and sale, having been issued against two joint purchasers of a tract of land, for the amounts then respectively due by them, one of the vendees alone applied for an injunction, praying for a rescission of the sale, &c. An injunction was issued, arresting the proceedings as to both vendees. The injunction being subsequently dissolved: *Held*, that damages under the act of 25th March, 1831, § 3, could be allowed only on the amount due by the vendee, who had enjoined the proceedings; and that the act of 1831, being one of great severity, should be strictly construed. Gorham v. Hayden, 450.

7. If execution be issued after a suspensive appeal, the Judge of the inferior court may grant an injunction to prevent a sale. *Per Curiam.* This is

not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal. Aubert v. Robinson, 463.

INSOLVENCY.

I. *Of the Fact of Insolvency.*
II. *Effect of a Surrender on Rights of Insolvent.*
III. *Of the Syndics.*
IV. *Contracts of Insolvent Fraudulent or Void as to Creditors.*
V. *Sale of Property of Insolvent.*
VI. *Privileges of Creditors and Tableau of Distribution.*

I. *Of the Fact of Insolvency.*

1. A bank will not be considered as insolvent, merely because it has gone voluntarily, or been forced into liquidation under the act of 14th March, 1842, relative to the liquidation of banks. The provisions of the act do not authorize such a presumption, nor contemplate the insolvency of the Bank as a cause for the forfeiture of its charter; the charter may be forfeited by a violation of its provisions, without the Bank being insolvent. Commissioners of the Exchange and Banking Company of New Orleans v. Mudge, 387.
2. It is only when the whole amount of the capital stock of a bank, together with its assets, is insufficient to meet its liabilities, that it can be said to be insolvent. Ib.
3. No law of this State in existence before 1842 defined the insolvency of a corporation, or provided for its voluntary or forced liquidation. The acts of the 14th, and 26th March, 1842, and 5th April, 1843, apply alike to solvent and insolvent banks, and whether their liquidation be forced or voluntary. They are special laws, for special purposes, and are to be construed together, as *in pari materia*. To them alone, we must look for the mode of proceeding, and for the powers and duties of the commissioners of liquidation. The Legislature intended by these acts to provide specially for the holders of the notes of the banks in the course of liquidation, and to make the circulation of each bank a good offset to debts due to it. These statutes make it the duty of the commissioners to allow such offsets, and they violate no vested right, nor impair the obligation of any contract.
Ib.—Rehearing, 397.

II. *Effect of a Surrender on Rights of Insolvent.*

4. The insolvency of a husband, who has made a surrender of his property, does not deprive him of his marital power of appearing in court to assist his wife, nor prevent his being made a defendant for that purpose. C. P. 118.
Twichel v. Andry, 407.

III. *Of the Syndics.*

Where the syndics of the creditors of an insolvent have failed to furnish

the bond required by law, a creditor may take a rule on them to show cause why another meeting of the creditors should not take place, to appoint other syndics in their place; and the rule will be made absolute, in the absence of proof of a compliance with their obligation to furnish a bond. The creditor was under no obligation to take a rule on them to show cause why they should not give bond. Talhaud v. His Creditors, 317.

6. Oppositions having been filed to the homologation of a *tableau* of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the *tableau* set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of disturbing the sales and resisting the homologation of the *tableau*, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed on the *tableau* as creditors of the insolvent, on the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property: *Held*, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be cumulated in the same action, (C. P. 149;) that the demands in the original oppositions must be considered as abandoned by the supplemental oppositions; and that any claim for damages against the syndic, personally, for malfeasance, should be brought against him individually, and not by way of opposition to a *tableau* of distribution. Blake v. His Creditors, 530.

IV. *Contracts of Insolvent Fraudulent or Void as to Creditors.*

7. It is essential to a revocatory action in which an act of an insolvent is attacked, as having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit. Lawrence v. Bowman, 21.

8. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1982. Hill v. Barlow, 142.

9. The action allowed by the tenth and eleventh sections of the act of 28th March, 1840, abolishing imprisonment for debt, cannot be maintained, unless the unjust advantage, or preference, given by the creditor to one of his debtors, or the conveyance, transfer, mortgage, or pledge of his property made by him, shall have had the effect of injuring the complainant. Thus, where the property alleged to have been fraudulently and illegally sold, had been seized under a *fi. fa.* by a third person, who had, under art. 722 of the Code of Practice, by the mere act of seizure, acquired a preference over the other creditors, the plaintiff cannot maintain his action; as the annulling of the sale could only benefit the creditor who had acquired a privilege by his seizure. Lott v. Gray, 152.

10. By the common law a debtor may make a valid assignment for the benefit of his creditors, and may even give preferences to a certain class of them, and it is no objection to such an assignment, that it defeats the legal remedies of all other creditors, though a majority in number and value, unless there be some provision of a bankrupt law to invalidate the deed. But the assignment must be absolute and unconditional, the assignor neither retaining power to change the trustees, nor a control over the deed of trust.

Fellows v. Commercial and Rail Road Bank of Vicksburg, 246.

11. By the common law the assent of creditors will be presumed, in case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated by the debtor, and the property is to be distributed among all the creditors *pro rata*. This assent is presumed on the ground, that the trust must be for their benefit. Ib.

12. The defendants, a corporation created by another State, in which the common law prevails, for the purpose of banking and constructing a railway, made an assignment of all their property to certain trustees. By the deed of assignment, among other things, it is declared, that the trustees shall be the joint agents of the corporation and of such of the creditors as may become parties thereto; that they shall render semi-annual accounts to the assignors; that the latter retain the right of substituting a new trustee in case of vacancy; and that the trustees shall borrow a sum of money for the completion of the railway within the time prescribed by the charter, for the purpose of saving the property and the charter from forfeiture, the amount to be repaid by preference, out of the effects assigned, and its repayment secured by a lien on the real estate of the corporation; the deed reciting the inability of the corporation from the pressure of its debts, to raise the means of completing the road, as the principal cause for making the assignment. There was no schedule of the creditors, nor specification of the property intended to be conveyed. The Directors reserved the right of controling the trustees in relation to claims against the corporation of a doubtful character. In an action by plaintiffs, creditors of the corporation, who had never expressly assented to the assignment, commenced by attachment of a debt due to the corporation in this state: *Held*, that many of the stipulations in the deed are inconsistent with the idea of a *bona fide* assignment by which the legal title of the property of the debtors is to be vested in trustees for the benefit of the creditors; that it is rather the creation of an agency to manage the affairs of the corporation, under the supervision of the Directors, for the purpose of completing the road; that it is not such an assignment as would be valid by the common law; and that the assent of the plaintiffs, as a part of the creditors, cannot be presumed. Attachment maintained. Ib.

V. *Sale of Property of Insolvent.*

13. If the holder of a note secured by mortgage, appears at the meeting of the

creditors of an insolvent, and votes for a sale of the mortgaged property on terms of credit, he will thereby release the endorser.

M'Guire v. Wooldridge, 47.

VI. *Privileges of Creditors and Tableau of Distribution.*

14. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. Caseaux v. His Creditors, 268.

15. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment. Ib.

16. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722. Ib.

17. Where a mortgage creditor of an insolvent who has made a cession of his property appeals from a judgment, allowing the sums claimed by certain law officers for their fees, the latter must be made parties to the appeal. It is not enough that the syndic, who has no interest in a contest between privileged creditors as to their relative rank, should be cited.

Cassidy v. His Creditors, 303.

18. The appellant, a partner of the insolvent in a saw mill, was to manage the business, taking charge of the receipts and disbursements, and to be entitled to a certain portion of the profits after all expenses were deducted. The insolvent was to furnish the land, buildings, laborers, and necessary capital for the purchase of materials. The appellant claims, under art. 2157, § 1, 3, of the Civil Code, to be subrogated to the rights of certain mechanics and laborers employed on the mill whose claims had been paid by him. *Held*, that there was no subrogation; that the debts were paid by the appellant in the course of his administration of the partnership business; and that, as to the insolvent, any advances made by the appellant could give him only the privilege of a partner on the partnership property, entitling him to be paid out of its proceeds in preference to any individual creditor of the insolvent.

Gordon v. His Creditors, 328.

See 6 *Supra.*

INTEREST.

1. On a plea of usury by the maker or accommodation endorser of a note, the holder will be entitled to recover only the amount actually paid by him. Satterfield v. Compton, 120.

2. The holder of a promissory note, protested for non-payment, is entitled to interest on the amount due from the day of protest. Act 14th February, 1821, sect. 2. Mason v. Alexander, 166.

3. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. Ib.

4. Where a creditor whose debt is actually due, gives time to his debtor, taking a note payable at a future period, but stipulating that on failure by the latter to pay at the maturity of the note, he shall pay the highest conventional interest from the date of the note till paid, the agreement is legal. In such a case the creditor will be presumed to have remitted the interest he had a right to exact for the credit allowed, and the debtor, on failing to take up the note at maturity, will only pay the conventional interest allowed by law. Otherwise, where such a stipulation is contained in a note given for the price of property sold on a credit. In this case it must be presumed that the price was proportioned to the length of credit, and paid not only for the property, but for its use from the sale to the stipulated time of payment, and that any penalty or damages agreed on, though in the form of interest, must have been for the purchaser's default or delay in paying, which is usurious and illegal. To enforce such an agreement, would be to compel the purchaser to pay the amount of the interest between the date and maturity of the note, in addition to the highest conventional interest from the latter period, thus condemning him to pay as a penalty, or as damages for the inexecution of an obligation to pay money, more than the highest rate of conventional interest, which, whatever be the shape of the contract, the law forbids. C. C. 1925, 2895. Griffin v. His Creditors, 216.

5. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and the courts will lend their aid to carry the agreement into effect. C. C. 1928. *Aliter*, where the contract is to pay a sum of money. In such a case, no damages exceeding the highest rate of interest allowed by law, can be stipulated. The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to such damages, without proving any loss; and he can recover no more, no matter what loss he may have sustained. C. C. 1929. Ib.

6. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the pro-

perty producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. Daigle v. Bruzzé, 418.

See New Orleans, 3.

INTERPRETATION.

1. The legislative authority has no power to fix, by a declaratory act, or otherwise, a construction of the constitution of the State, which shall be binding on the judicial department. If the courts occasionally rely upon legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, or modify them, or to settle their construction in cases of ambiguity, by a declaratory act. Cotton v. Brien, 115.

2. Every law empowering our courts to decide upon the rights of absentees must be strictly construed, and the formalities prescribed exactly followed. Hill v. Barlow, 142.

3. A law should never be considered as applicable to cases which arose previous to its enactment, unless the Legislature have, in express terms, declared such to be their intention. Succession of Oyon, 504.

See Insolvency, 3.

JUDGMENT.

1. Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action. Maxwell v. Collier, 86.

2. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. Lovelace v. Taylor, 92.

3. No state court can inquire into any act or judgment of a court of the United States, upon the merits, nor say whether the judgment was rendered upon proper evidence, or is correct; but when the proceedings of a court of the United States are set up as the basis of title, between persons litigating in our own courts, they may be looked into to ascertain whether the court had authority to render such a judgment, whether there is in fact such a judgment, or to ascertain whether the executory proceedings under it were legal. Lowry v. Erwin, 102.

4. To support a sale by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. Ib.

5. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just

title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. Ib.

6. The rule *stare decisis* is entitled to great weight and respect, where there has been on any point of law a series of adjudications, all to the same effect; but a single decision, believed to have been unadvisedly or erroneously made, will be overruled. Griffin v. His Creditors—Rehearing, 225.

7. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to. Jones v. Hunter, 235.

8. A rule supported by affidavit, taken on a Judge of a Court of Probates, to show cause why a mandamus should not be issued to compel him to pronounce a judgment on a case which had been submitted for decision more than twelve months previously, will be made absolute where no cause is shown by the Judge. State v. Judge of Probates of St. James, 272.

9. Objections to a verdict and judgment, on the ground that a juror and one of the witnesses were interested, cannot avail a party to the action, who did not appear at the trial, and challenge the juror or object to the witness; nor would such objections support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision, on such grounds. Cressap v. Winchester, 458.

10. Service of notice of judgment on a defendant at his last place of residence in the parish in which the judgment was obtained, is sufficient, although he may have afterwards resided in another parish in the State. Ib.

11. Plaintiff moved to dismiss his action, at his costs, and an order was made accordingly, but before the order of dismissal was signed, it was set aside on his own motion, without notice to defendant. A judgment by default was subsequently taken, and confirmed against the defendant. On appeal by the latter: *Held*, that after dismissing his action, plaintiff could not have the order of dismissal set aside, and the case re-instated without notice to defendant. Michel v. Blackman, 465.

JUDGMENT BY DEFAULT.

A judgment rendered against one in another State, in an action in which the defendant, after having pleaded, withdrew his plea, is not a judgment by default in the meaning of art. 747, of the Code of Practice, and an order of seizure and sale may be issued thereon. A judgment by default, according to the laws of this State, takes place only where the defendant has neither appeared, nor answered. Stone v. Minor, 29.

See PLEADING, 21.

JURY.

1. Damages can be assessed only by a jury; and in suits before the District Court of the First District, or the Parish, or Commercial Courts of New Orleans, the plaintiff must advance the compensation allowed to the jurors by the 17th sect. of the act of 10th February, 1841, where the defendant has not done so. C. P. 313.

Liles v. New Orleans Canal and Banking Company, 273.

2. The provision of the 17th sect. of the act of 10 February, 1841, which declares that the cases then pending before the District Court of the First District, and the Parish and Commercial Courts of New Orleans, "shall be stricken from the jury docket, unless the compensation fixed by that act to be allowed to jurors, be advanced by the party demanding a trial by jury," is not unconstitutional. *Per Curiam.* Under the twentieth section of the sixth article of the State Constitution no acquired rights, or existing contracts can be affected by subsequent legislation; but it is otherwise as to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio,*) is always within the control of the Legislature, which can, at any time, make any change, or modification it may think conducive to the public good and the proper administration of justice. Baldwin v. Bennett, 309.

3. Objections to a verdict and judgment, on the ground that a juror and one of the witnesses were interested, cannot avail a party to the action, who did not appear at the trial, and challenge the juror or object to the witness; nor would such objections support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision, on such grounds.

Cressap v. Winchester, 458.

JUSTICE OF THE PEACE.

Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3 March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal.

McLean v. Carroll, 43.

LEGISLATURE.

See INTERPRETATION, 1.

LETTING AND HIRING.

I. *Letting of Things.*
II. *Hire of Labor or Industry.*

I. *Letting of Things.*

1. Persons in possession as tenants cannot, by consenting to possess for a third person, or by permitting others to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlords. C. C. 3408, 3409. Wells v. Hickman, 1.

2. A lessor, though entitled to retain the things on which his lien exists, must, in order to be paid, have them sold in the manner provided by law; and if any conflict arise, from adverse claims to the proceeds, a distribution must be made as provided by the 6th chapter of the 21st title, of the third book of the Civil Code, establishing the order in which privileged creditors are to be paid. Tanner v. Tanner, 35.

3. No one can be permitted to change the character of his own possession; nor can a tenant acquire a title adverse to his landlord's, and continue to possess for himself. Metoyer v. Larenandière, 139.

4. Where one who has leased a house or room for a fixed period, continues in possession for a week after his lease has expired, without any opposition from the lessor, the lease will be presumed to have been continued at the same price and on the same conditions, but for no particular period, (C. C. 2659;) and under art. 2655 of the Civil Code, he will hold by the month, and can only be expelled after the fifteen days notice required by art. 2656, and can quit the premises only after giving a similar notice to the landlord. At any time within a week after the expiration of the lease, the tenant may be expelled without notice, or he may leave in like manner. Bowles v. Lyon, 262.

5. Where a wife is a public merchant, carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. C. C. 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. C. C. 2675, 2676, 2677. Deslix v. Jone, 292.

II. *Hire of Labor or Industry.*

6. The wages of an overseer are to be paid out of the product of the crop of the year, in preference to the claims of the lessor. C. C. 3226. Tanner v. Tanner, 35.

7. An overseer, whose services have continued during one year, and a part of

a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crop of the second year, valid against a third person, who purchases during the second year the plantation and crop then in the ground. The privilege, which had been acquired before the sale, could not be divested by it. Such a privilege is not required to be recorded, in order to preserve it. C. C. 3226, 3243. Welsh v. Shields, 484.

See CARRIERS.

LITIGIOUS RIGHT.

The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.

Evans v. Wilkinson, 172.

MANDAMUS.

1. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3 March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal. McLean v. Carroll, 43.
2. If a mandate of the Supreme Court be not obeyed, the party obtaining the judgment must enforce it by a *mandamus*. Lovelace v. Tyler, 92.
3. A rule supported by affidavit, taken on a Judge of a Court of Probates, to show cause why a mandamus should not be issued to compel him to pronounce a judgment on a case which had been submitted for decision more than twelve months previously, will be made absolute where no cause is shown by the Judge. State v. Judge of Probates of St. James, 272.
4. A District Court cannot issue a mandamus to a Recorder of Mortgages, commanding him to erase certain mortgages, without having notified the parties interested. French v. Prieur, 299.

MARSHAL.

An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 192.

MARSHAL OF THE UNITED STATES IN LOUISIANA.

The Marshals of the United States in Louisiana, in executing process, are

bound, by an act of Congress, and the rules of the Circuit Court, to conform to the state laws; and when their proceedings form a link in a chain of title set up, the state courts will examine into their legality. A state court cannot direct a Marshal how to act, nor direct process to him to be executed; but when he has acted, and his acts are instrumental in changing the titles to property, they will, between litigants before a state court, be examined into. Lowry v. Erwin, 192.

MEXICAN GULF RAILWAY COMPANY.

1. Under the provision of the 15th sect. of the act of 9th March, 1837, incorporating the Mexican Gulf Railway Company, declaring that "if any stockholders shall fail to pay any instalment required to be paid, for the period of thirty days next after the same shall have become due and payable, the stock on which such instalment shall have been called in, shall be forfeited to the Company," it is optional with the Company under the circumstances mentioned, in a contest between it and the stockholder, to declare the stock and the sums paid in forfeited, or to require the execution of the obligation of the stockholder, by paying the whole amount of the shares subscribed for by him. Mexican Gulf Railway Company v. Viavant, 305.

2. A subscriber for the stock of an incorporated company cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. He will be bound to pay the amount subscribed by him, though books of subscription were not regularly opened according to the charter. Ib.

MINOR.

1. It being the duty of the under-tutor to act for the minor whenever the interest of the latter is adverse to that of the tutor, he is the proper person contradictorily with whom the accounts of the tutor must be settled, and the judgment rendered on such settlement fixes the amount due to the minor; but he has no authority to execute such a judgment against the tutor, so long as the latter remains in office. Holmes v. Hemken, 51.

2. An under-tutor has no right to receive any part of the property, nor any funds belonging to the minor. If they are considered unsafe in the hands of the tutor, or if there be any sufficient cause, the under-tutor may sue for his removal, and for the appointment of another tutor, who, on giving security, will be competent to enforce the minor's rights against his former tutor. Ib.

3. The tacit mortgage of a minor can only be enforced against his tutor, after the termination of the functions of the latter. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claims, in consequence of sales by the tutor, or of executions levied on his property, his tacit mortgage may be enforced against

the purchasers in the mode pointed out by art. 715, of the Code of Practice. Ib.

4. The emancipation of a minor under the provisions of the acts of 23d January, 1829, and 25th February, 1837, gives him all the power over his property and rights, of a person of full age. He may, consequently, ratify any act of partition or compromise effected by his tutor during his minority; and the ratification will cure all defects in the original transaction. C. C. 1869, 2225, 2252. Wilson v. Craighead, 429.

5. Where an emancipated minor, joins with his co-heirs in an act of settlement and partition of the succession of his mother, and accepts his portion as ascertained thereby, and there is no evidence that the settlement did not embrace all the property of the succession, he will be concluded by it. Ib.

6. A tutor who has received nothing, and could not have received any thing for his minor, having had nothing to act upon, has no account to render. Ib.

7. The formalities prescribed for the sale of the property of minors, being exclusively for their benefit, the nullities resulting from their omission are purely relative, and the minors alone, after coming of age, can avail themselves of them. Such a sale is, consequently, not absolutely null. Rousseau v. Tête, 471.

MISSISSIPPI, STATE OF.

The provision of the constitution of the State of Mississippi, which declares, that "the introduction of Slaves into this State as merchandize, or for sale, shall be prohibited from and after the first day of May, 1833," is not merely directory to the Legislature, and inoperative until it shall prohibit their introduction under appropriate penalties. It is prohibitory *per se*, rendering any contract void made in contravention thereof. Cotton v. Brien, 115.

See STATUTES, IV.

MOTION.

The right to proceed by a rule to show cause, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, arising in the progress of the contestation, except where a summary proceeding is expressly allowed by law. Thomas v. Bourgeat, 435.

MOVEABLES AND IMMOVEABLES.

Bricks, made by the former owner, not to be used on the place, but for sale, and lying there at the time of a Sheriff's sale of the premises, are moveables, and not included in the adjudication of the land to the purchaser. C. C. 459, 460, 464, 465, 468. Key v. Woolfolk, 424.

MORTGAGE.

I. *Execution of Mortgages.*
II. *Legal and Judicial Mortgages.*
III. *Registry of Mortgages.*
IV. *Sale of Mortgaged Property.*
V. *Privileges affecting Mortgaged Property.*
VI. *Erasure of Mortgages.*

I. *Execution of Mortgages.*

1. A mortgage in favor of an absentee, executed and registered by the mortgagor, has its legal effect though not accepted by the mortgagee.
Hill v. Barlow, 142.

II. *Legal and Judicial Mortgages.*

2. The tacit mortgage of a minor can only be enforced against his tutor, after the termination of the functions of the latter. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claims, in consequence of sales by the tutor, or of executions levied on his property, his tacit mortgage may be enforced against the purchasers in the mode pointed out by art. 715, of the Code of Practice.
Holmes v. Hemken, 51.

3. The words "*or otherwise disposed of the same*," in art. 2367, of the Civil Code apply not to the price of the paraphernal property sold by the wife, but to the property itself, or its value, when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. The legal mortgage given to the wife, by that article, on all the property of her husband for the reimbursement of the value of her paraphernal property, is not confined to the case of the sale of the property, but extends to all cases where the husband receives money for his wife or disposes of her property in any way for his individual benefit, and it attaches from the moment of such receipt or conversion. Compton v. Her Husband, 154.

4. Though the wife has a right to administer personally her paraphernal property, without the authorization of her husband, and, even where she has left its administration to him, may resume it at any time, yet if, during his administration, he has sold any part of it, she has, under art. 2367, a mortgage on his property for its value. Ib.

See 8 *Infra.*

III. *Registry of Mortgages.*

5. Where an act by which a mortgage is retained is passed in the office of a Parish Judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. So of the *procès-verbal* of sale made by a Pa-

rish Judge while acting *ex officio* as an auctioneer. A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. Dodd v. Crain, 58.

6. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered. Rachal v. Normand, 88.

7. The provisions of arts. 3314, 3316, of the Civil Code, that neither the contracting parties, nor their heirs, can take advantage of the non-inscription of a mortgage, are not irreconcileable with art. 333 of the same Code, which declares, that the effect of a mortgage will cease, even against the contracting parties, if the inscription has not been renewed before the expiration of ten years from its date. The intention of the legislator was, that a mortgage whether inscribed or not, shall cease to have its legal effect after ten years, to be reckoned, when not inscribed, as to the parties, from its date, and as to third persons from the time of its inscription, unless renewed before the expiration of that term; that, though the mortgage to have effect between the parties, need not be recorded during the first ten years from its date, yet to continue in effect afterwards, it must have been inscribed, as directed by art. 3333, before the expiration of that period; and that this inscription may be considered as a renewal of the mortgage between the parties, and against third persons. Minor v. Alexander, 166.

8. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. Mary v. Lampré, 314.

9. Neither the parties, nor their heirs, nor the witnesses to the act by which a mortgage is stipulated, can take advantage of its non-inscription during the first ten years from its date (C. C. 3316;) but it will cease to have effect, even as to them, after that period, if not inscribed before its expiration. C. C. 3333. Lejeune v. Hébert, 419.

IV. *Sale of Mortgaged Property.*

10. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist. French v. Prieur, 299.

11. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The purchaser takes the property free of the incumbrances; and the Probate Court may order their erasure. Ib.

12. Plaintiff having recovered a judgment against defendants, caused a *fi. fa.* to be levied on a certain portion of a rail road belonging to them, and on certain fixtures, machinery, lumber, and other personal property connected with

the road. The whole was offered for sale *in globo*, the Sheriff producing at the sale a certificate from the Recorder of Mortgages showing the existence of a mortgage, having a preference over the plaintiff, in favor of third persons, "on all the rights, privileges, immunities, and titles of the Company." Plaintiff was the highest bidder, but offered a sum less than the amount of the mortgage. The officer returned that there had been no sale. On a rule on the latter, the defendants, and the mortgagees, to show cause why the property offered for sale should not be delivered to plaintiff: *Held*, that there was no adjudication, and that the rule should be discharged.

Ranney v. Orleans Navigation Company, 380.

See EXECUTORY PROCESS. INSOLVENCY, 13. SALE, 14.

V. *Privileges affecting Mortgaged Property.*

13. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment.

Caseaux v. His Creditors, 268.

14. Where an owner of ground, an undertaker or builder by trade, borrows a sum of money for the purpose of building thereon, the amount to be advanced to him according to the progress of the work, executing a mortgage on the property improved to secure its re-payment, and employs workmen to construct the buildings under his own directions, the latter will, under art. 2743 of the Civil Code, be entitled to a privilege for the payment of their labor on the building constructed by them, entitling them to be paid in preference to the mortgage creditor. It is only where there is an undertaker interposed between the owner and his workmen, that arts. 2744 and 2745 of the Civil Code are applicable. Where workmen are employed by the proprietor himself, they are put on the same footing, and allowed the same privilege as an undertaker. Succession of Erard, 333.

See INSOLVENCY, 17.

VI. *Erasure of Mortgages.*

15. A District Court cannot issue a mandamus to a Recorder of Mortgages, commanding him to erase certain mortgages, without having notified the parties interested. French v. Prieur, 299.

16. On an application for a mandamus to compel the erasure of the mortgages existing on property sold by order of a Probate Court, the declaration of the applicant is not the best evidence of the sale; the *procès-verbal* of the sale and adjudication should have been produced. Ib.

See INSOLVENCY, 9.

NATURAL CHILD.

1. The acknowledgment of an illegitimate child in a will, is sufficient to entitle

such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227.
Jones v. Hunter, 236.

2. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. Ib. 1474.
Ib.

NEUTRAL TERRITORY.

See PUBLIC LANDS OF THE UNITED STATES.

NEW ORLEANS.

1. The erection of wharves before the city of New Orleans and its suburbs, at such places as commerce may require, is a legitimate exercise of power by the Council of any of its Municipalities.
Shepherd v. Third Municipality of New Orleans, 349.

2. Under an ordinance of the Council of the Second Municipality of New Orleans, which had been in force for several years, a fixed annual tax was levied on the assessed value of the real estate within the Municipality. In the month of December it was ascertained that the revenues of the Municipality would be insufficient to discharge its debts; and an ordinance was passed laying an additional tax for the year ending with that month, and for the succeeding year. In an action to recover the increased tax for the year just expiring: *Held*, that no period of the year being fixed by law when the tax shall be laid, the retrospective operation of the ordinance is no proof of its illegality. Second Municipality of New Orleans v. Orleans Cotton Press Company, 411.

3. The fifth section of the act of 10th March, 1834, relative to the powers of the Mayor and City Council of New Orleans, and the ordinances of the Second Municipality of that city, of December, 1838, require a notification to the tax payer, before he can be made liable for interest at the rate of eight per cent a year, on the taxes due by him. Where he has not been put in default, interest can be recovered only from judicial demand. Ib.

NEW TRIAL.

1. The omission of counsel to interrogate a witness as to a particular fact, is no ground for a new trial. Lowry v. Erwin, 192.

2. A new trial will not be granted on an affidavit by one of the counsel of a defendant that he had discovered, since the judgment, new and material evidence, of the existence of which he was not aware at the time of the trial, though he had used due diligence, &c., where it is not shown that the defendant, or his other counsel, were also ignorant of the existence of such

evidence, and the witness by whom the new fact is expected to be proved was examined on the trial of the cause. Ib.

NOLLE PROSEQUI.

1. A District Attorney, prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of the defendant, after trial commenced and evidence given, to insist on a trial. The court has no right to control the attorney of the State, in this respect.

State v. Bugg, 63.

2. The sureties in a bond to the State for the good behavior of a party and his appearance at court, may avail themselves of all the pleas which their principal could urge. A *nolle prosequi* entered as to their principal, will discharge them. Ib.

NONSUIT.

A plaintiff may discontinue his action, at any time before judgment has been rendered, on paying the costs. C. P. 491. But he has no right to call upon the court for a judgment of nonsuit. As a general rule, when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable and which ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are to be left to the sound and legal discretion of the court, without any interference on the part of the parties. Crocker v. Turnstall, 354.

NOTARY.

See Bills of Exchange and Promissory Notes, 13 to 17, and 20 to 26. Registry, 1.

NOTICE.

See Bills of Exchange and Promissory Notes, 13 to 17, and 20 to 26. Judgment, 10, 11.

NOVATION.

1. Where notes were given by defendant and another person, for a purchase made in violation of a prohibitory law rendering the transaction null and void, the substitution of a single note by defendant alone for a balance due after a part payment, will not bar the latter from pleading the illegality of the original contract. *Per Curiam.* The debt does not cease by the release of one of the original debtors, to be the same debt, growing out of the same transaction. Cotton v. Brien, 115.

2. Where the holder of a note endorses on it that he has received from the maker four smaller notes, amounting together to the sum for which the first note was given, which when paid, will be in full of the original note, he may sue on the latter, but to protect the defendant from the danger of suits by endorsees of the smaller notes, the judgment should provide that no execution be issued, nor the judgment itself be recorded by the Recorder of Mortgages, until the smaller notes are delivered to the defendant, or deposited for him in court. Rieder v. Theurer, 375.

3. Where for the convenience of the vendors, in order to enable them to divide the price among themselves, the notes originally given by the vendees, are cancelled, and others executed in their place, each for smaller sums, but in the aggregate for the same amount, in the same form, and payable at the same periods, nothing being changed as to the position or obligations of the purchasers, there is no novation.

Citizens Bank of Louisiana v. Tucker, 443.

NULLITY.

See CONTRACTS, 2. DONATIONS INTER VIVOS. SALE, VI.

OFFENCES AND QUASSI OFFENCES.

1. An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 199.

2. Plaintiffs having obtained a judgment against defendant in another State, instituted a suit on the judgment here, attaching certain property, and, pending the attachment, transferred their judgment to one of their creditors, to be applied towards the satisfaction of his claim. A third person having intervened in the attachment suit, and proved the property to be his, claiming damages for the illegal attachment, against the plaintiffs and their transferree: *Held*, that the damage sustained by the intervenor resulted from the original levy of the attachment; that the plaintiffs having, even after the transfer, a greater interest in the action than their transferee, the latter could not have dismissed the attachment; and that, consequently, judgment for damages could be rendered only against the plaintiffs.

Caldwell v. Mayes, 376.

3. As between the principal and surety in an attachment bond, and the defendant in whose favor it is executed, a claim for damages for an illegal attachment is *ex contractu*; but if the property of a third person be attached under proceedings authorizing the seizure of that of the defendant, it is a trespass, and the right of the party injured to obtain reparation arises neither from a contract, nor quasi-contract, but under art. 2294 of the Civil Code, which declares that every act of man which causes damage to another, obliges him by whose fault it happened, to repair it.

Edwards v. Turner, 382.

4. The distinction between offences and quasi-offences is, that the former are those illegal acts which are done wickedly and with the intent to injure, while the latter are those which cause injury to another, but proceed only from error, neglect, or imprudence. Ib.

5. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502. Ib.

6. Defendants, in the absence of plaintiff, seized under a *fi. fa.* against a third person, furniture belonging to the plaintiff, and sold it. The plaintiff's landlord afterwards claimed and received the proceeds, in virtue of his privilege on the furniture for rent. In an action for the value of the furniture against the Sheriff and the seizing creditors, there was a judgment for the defendants. On appeal: *Held*, that the court below erred; that it is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, that they gained nothing by them, and that another got the money they were endeavoring to obtain; that the course pursued by the defendants compelled the landlord to assert his claim, and that it is not shown that he would, in the absence of the plaintiff, have taken any step to have the furniture sold. Case remanded. Lawrence v. Hozey, 385.

7. In an action for damages, for an assault and battery and slander, evidence as to the plaintiff's character is inadmissible, even in mitigation of damages. Gardner v. Cross, 454.

See Shipping, 2.

OWNERSHIP.

Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (C. C. 451,) susceptible of ownership, (C. C. 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him.

Ternant v. Boudreau, 488.

OPPOSITION OF THIRD PERSONS.

See Injunction, 5.

PARISH JUDGE.

A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. Dodd v. Crain, 58.

See Courts, IV.

PARTNERSHIP.

1. The laws of this State recognise no authority in a surviving partner. He cannot administer the effects of the partnership, until regularly appointed; nor is he then styled the surviving partner, but administrator. Nor will the omission of a defendant to except to the capacity of one who sues as a surviving partner, be considered as an admission of his right to sue as such. That which has no legal existence cannot be considered as tacitly admitted. Notrebe v. Kenney, 13.

2. After the dissolution of a partnership no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. Reedy v. Harding, 70.

3. A partner in an ordinary partnership, may, during its existence, bind his co-partner, if it be shown that the transaction benefitted the partnership. C. C. art. 2845. Ib.

4. The members of a private association, formed for the purchase of steamers, and the transporting of passengers and merchandize for hire, are commercial partners; and where the partnership has been dissolved, they may be sued for a debt due by the association individually, or a part of them only, without joining the rest. Lambeth v. Vawter, 127.

5. Commercial partners are bound, *in solido*, for the debts of the partnership towards third persons. Their responsibility is not limited to the interest they may have in the concern, though the extent of such interest was known to the party with whom the contract was made. Ib.

6. Where the members of a private association, formed for commercial purposes, have agreed that the affairs of the partnership shall be conducted by a president and directors, who are actually chosen, no individual partner can bind the firm. By choosing these officers, the partners have selected the administrators of the partnership affairs. Ib.

7. Admissions made after the dissolution of a partnership, by one who had been a member, are not binding on those who were associated with him. Ib.

8. In ordinary partnerships, each partner is only bound for his share of the partnership debts to be calculated in proportion to the number of partners, and without reference to the portions of the stock or profits to which each may be entitled. C. C. 2844. Griffin v. His Creditors, 216.

9. The proprietors of steamers, such as are employed in towing vessels between New Orleans and the Gulf of Mexico, are commercial partners. C. C. 2796. *Per Curiam.* It does not follow because these boats have no privilege for their hire, that their owners are not responsible in the same manner as the owners of boats differently employed. Privileges are arbitrary provisions of the law. Davis v. Houren, 255.

10. After the dissolution of a partnership, none of the members can bind the others without special authority from them. Nor can they, after such a dissolution, bind the others, or the firm, for the payment of a debt which has been prescribed, any more than they can create an entirely new obligation. Ib.

11. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. Mary v. Lampré, 214.

12. The appellant, a partner of the insolvent in a saw mill, was to manage the business, taking charge of the receipts and disbursements, and to be entitled to a certain portion of the profits after all expenses were deducted. The insolvent was to furnish the land, buildings, laborers, and necessary capital for the purchase of materials. The appellant claims, under art. 2157, § 1, 3, of the Civil Code, to be subrogated to the rights of certain mechanics and laborers employed on the mill whose claims had been paid by him. *Held*, that there was no subrogation; that the debts were paid by the appellant in the course of his administration of the partnership business; and that, as to the insolvent, any advances made by the appellant could give him only the privilege of a partner on the partnership property, entitling him to be paid out of its proceeds in preference to any individual creditor of the insolvent. Gordon v. His Creditors, 328.

13. In an ordinary partnership, formed for a particular purpose, neither of the partners can bind the other unless authorized to do so, specially, or by the articles of partnership. C. C. 2843. Bourgerol v. Allard, 351.

14. One of two partners in a particular adventure, may renew a note given by a purchaser of the partnership property, without exceeding his authority as a partner. Whatever he does fairly and honestly, before the final consummation of the business, will be binding on his co-partner. Lallande v. Bouny, 363.

PATENT.

See PUBLIC LANDS OF THE UNITED STATES, 1, 2.

PAYMENT.

1. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367. Maxwell v. Collier, 86.

2. An imputation of payment made by a creditor, and subsequently ratified by the debtor, will take effect from its date, though the former may, in the in-

terval, have become the holder of another debt to which the debtor, or one bound as surety for him, might otherwise have required it to be imputed.

Metoyer v. Trezzini, 124.

3. Where a creditor becomes the purchaser of property sold at her instance at a Sheriff's sale, subject to her mortgage and privilege as vendor, the debt secured by such mortgage and privilege is, *pro tanto*, extinguished by confusion. She cannot claim to have the price bid by her imputed to another debt, so as to affect the rights of other creditors.

Griffin v. His Creditors, 216.

4. The rules laid down by the Civil Code, art. 2162, relative to the imputation of payments where two debts are of the same nature and equally onerous, apply to settlements between debtor and creditor; they cannot be enforced to the prejudice of third persons. Ib.

5. Where in an action on a note, defendant claimed credit for a sum proved to have been paid to plaintiff, but the latter alleged that the payment was made in discharge of another debt: *Held*, that it was for the plaintiff to show that he was the holder of another obligation, which had been, or ought to have been credited with the amount. Mann v. Major, 475.

See PLEADING, 17.

PHYSICIAN.

A physician's bill is prescribed by three years. C. C. 3503.

Arbonneaux v. Letorey, 456.

See COMPENSATION, 2.

PLEADING.

I. *Parties to Actions.*
II. *Actions, Where to be brought.*
III. *Exceptions and Answer.*
IV. *Admissions.*
V. *Interrogatories to a Party.*
VI. *Possessory and Petitory Actions.*
VII. *Actions to Annul Sales made by an Insolvent, and Proceedings where there has been a Surrender of Property.*
VIII. *Actions by Heirs or Legatees to obtain Possession of Successions.*

I. *Parties to Actions.*

1. A creditor of a succession, holding a claim which had been acknowledged,

in writing, by the executor to be just, and had been placed among the admitted claims against the estate, subsequently petitioned the Probate Court to have the same ranked as a privileged debt, but did not make the executor a party to the proceeding. A judgment having been rendered *ex parte*, establishing the privilege, on appeal by the executor: *Held*, that the executor, not being a party, the judgment must be reversed.

Succession of Lilley, 24.

2. A married woman, not separated from bed and board, cannot sue or be sued, without the authorization of her husband, or that of the Judge before whom the suit is brought. Nor can she appeal from a judgment rendered against her, without having been so authorized. Cuny v. Dudley, 77.

3. The omission of a plaintiff in an action against a married woman, to cause her to be authorized, either by her husband or the court, to defend the suit, rendering the proceedings absolutely null, will be noticed by the court, though it escape the attention of the parties. In such a case the judgment may be reversed, and the case remanded to enable the plaintiff to have the opposite party legally authorized to defend the action.

Robinson v. Butler, 78.

4. The members of a private association, formed for the purchase of steamers, and the transporting of passengers and merchandize for hire, are commercial partners; and where the partnership has been dissolved, they may be sued for a debt due by the association individually, or a part of them only, without joining the rest. Lambeth v. Vawter, 127.

5. Under the bankrupt law of 1841, all the estate of the bankrupt is, by the issuing of the decree of bankruptcy, *ipso facto*, vested in the assignee. It is his duty to take possession without delay, and to administer the property to the best advantage for the benefit of the creditors. If resistance be made, the State courts will grant the necessary process to enable him to do so. The assignee may make himself a party to suits in the State courts in place of the bankrupt, and take the necessary steps to protect the property and interests confided to his care. Lewis v. Fisk, 159.

6. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. Doll v. Theurer, 276.

7. In every suit on a joint contract, all the obligors must be made defendants, though some may have paid their proportion of the debt; and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080.

Bourgerol v. Allard, 351.

II. *Actions, Where to be brought.*

8. An action against a party in possession of slaves, in which the plaintiff prays for a judgment declaring the title under which the former holds to be fraudulent, and ordering the slaves to be sold for the purpose of paying a balance due to him as vendor, with damages for the expense to which he has been subjected, and recognizing his privilege as a vendor, must be

brought before the court of the defendant's domicil, and not of the parish where the slaves may be. C. P. 89, 129, 162. Boner v. Elgee, 6.

9. An affidavit to disprove one made by the opposite party, for the purpose of removing a case from a State Court to a Circuit Court of the United States, under the 12th section of the act of Congress, of the 24th September, 1789, is inadmissible. The citizenship of the parties is a fact to be shown to the satisfaction of the court, and this showing is necessarily *ex parte*. The order of removal is not final; it is for the United States Court to decide ultimately upon its jurisdiction, which may remand the case to the State Court, should it think itself without jurisdiction. Franciscus v. Surget, 33.

10. Where a defendant in an action to recover a sum of money dies *pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P., 924. Thomas v. Cortes, 44.

11. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. Ib.

12. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can

be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor.

Lowry v. Erwin, 192.

13. Defendant having purchased a plantation and slaves at a Sheriff's sale, made under a *fi. fa.*, issued on a judgment obtained by him against the plaintiff, procured a monition to show cause why the sale should not be homologated. Plaintiff opposed the homologation, and, on the same day, brought suit, in the parish where the land was situated, and not that of defendant's domicil, to recover the land and slaves, with their fruits and revenues, and for damages against the defendant for having illegally and forcibly taken possession. The sale having been avoided, on the opposition to the monition, defendant prayed for the dismission of the action, on the grounds that the main question, of title, had been decided on the monition, and that the plaintiff had no right to cumulate with his petitory action, a personal one against the defendant, for the fruits and revenues, or for damages: *Held*, that notwithstanding his opposition to the monition, plaintiff had a right to commence the action; that, though the question of title was decided on the monition, that as to defendant's liability for the fruits and revenues, was undetermined, and that being a mere incident of the action of revendication, the suit was properly brought in the parish where the property is situated, although the defendant resides in another; and that jurisdiction having been once vested, it could not be divested by a judgment on a part of the matter in controversy. C. P. 153, 154, 162, 163. Winter v. Zacharie, 466.

14. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

III. *Exceptions and Answer.*

15. Where defendant is in possession of a judgment for a certain sum, payable in specie, from which no appeal has been taken, an allegation by the party against whom it was rendered, that, by the original contract, he was entitled to discharge the debt in the notes of a particular bank, cannot be inquired into on an application to enjoin the execution. Such a defence should have been urged in the original suit in which the judgment was rendered, under which the execution was issued.

Dayton v. Commercial Bank of Natchez, 17.

16. In an action by one for the use of another, the latter is the real plaintiff.

In such an action the defendant may urge any defence he may have against the nominal, or the real plaintiff.

17. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367. Maxwell v. Collier, 86.

18. An accommodation endorser, being viewed as a surety, may avail himself of any plea which his principal could have opposed to the holder.

Satterfield v. Compton, 120.

19. A defence that a memorandum of a contract of sale had been altered by the plaintiffs without the consent of the defendants, not made in the lower court, cannot be urged after appeal. Grimshaw v. Hart, 265.

20. In an action against the maker and endorser of a note, the defendants excepted to the action as premature, on the ground that the amount claimed by plaintiff was not yet demandable; as the latter, after the maturing of the note sued on, by a special agreement with the drawer, for a consideration received from him, had granted him a certain time within which to pay the note, which delay had not yet expired. The exception was sustained. After the expiration of the delay, the plaintiff obtained a judgment by default, which was set aside, the defendants filing separate answers, and the endorser urging that he had been discharged by the delay. There was a judgment against the maker, but in favor of the endorser. On appeal: *Held*, that though the fact of granting the delay was shown, the exception having been pleaded by both defendants, proved that the endorser knew that the delay had been granted, and consented to it, and that, having enjoyed the benefit of the plaintiff's indulgence, he is not discharged.

Gordon v. Dreux, 399.

21. The plea of prescription is one of those peremptory exceptions, which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action, previous to final judgment. Such exceptions raise no issue on the merits. Thus where a judgment by default has been set aside on filing a plea of prescription, and the exception is overruled, the case cannot be tried on its merits, until put at issue by an answer, or by a judgment by default, regularly entered, after the overruling of the exception. C. P. 345, 346.

Lejeune v. Hébert, 419.

22. An exception to a petition on the ground that the name under which the plaintiff sued is not his real name, will be overruled, where it does not state the name under which alone he could have sued.

Gardiner v. Cross, 454.

23. No dilatory exception can be pleaded after a judgment by default. Act 20th March, 1839, § 23. Welsh v. Shields, 484.

IV. *Admissions.*

24. The laws of this State recognize no authority in a surviving partner. He cannot administer the effects of the partnership, until regularly appointed;

nor is he then styled the surviving partner, but administrator. Nor will the omission of a defendant to except to the capacity of one who sues as a surviving partner, be considered as an admission of his right to sue as such. That which has no legal existence cannot be considered as tacitly admitted.

Notrebe v. M'Kinney, 13.

25. Where the petition alleged that an act of mortgage was intended by both mortgagors and mortgagees to secure to the latter an unjust and illegal preference, plaintiffs will be estopped from averring that the mortgage was unknown to the mortgagees, and not accepted by them.

Hill v. Barlow, 142.

V. *Interrogatories to a Party.*

26. Where a defendant, after having obtained several continuances, moves for leave to file an amended answer propounding interrogatories to the plaintiff, a resident of another State, evidently merely for delay, permission will be refused. Yeatman v. Henderson, 81.

27. Where a party to whom interrogatories have been propounded, states facts not closely connected with those as to which he has been questioned, the opposite party should move to strike out such irrelevant matter.

Wells v. Hickman, 1.

28. Under art. 351 of the Code of Practice, a party to an action to whom interrogatories are propounded can be required to answer, in open court, only when he resides in the parish where the court sits. Where his residence is out of the parish, but within the State, it is the duty of the party propounding the interrogatories to obtain from the court a commission directed to some Judge, or Justice of the Peace, in the parish in which the party interrogated resides, to receive his answers; or the interrogatories, if unanswered, cannot be taken *pro confessis*. C. P. 352.

Crocker v. Turnstall, 354.

VI. *Possessory and Petitory Actions.*

29. After an adjudication under a *fi. fa.*, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is essential to maintain a possessory action. C. P. 47. He must, if he still claims the property, resort to a direct action to annul the Sheriff's sale. Winn v. Elgee, 100.

30. A curator *ad hoc*, may be appointed to represent an absent defendant in a petitory action, as in any other. Art. 116 of the Code of Practice, does not limit the right of appointment to any particular class of actions.

Beaumont v. Covington, 189.

VII. *Actions to annul Sales made by an Insolvent, and Proceedings where there has been a Surrender of Property.*

31. It is essential to a revocatory action in which an act of an insolvent is at-

buried, or having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit. Lawrence v. Bowman, 23.

39. Oppositions having been filed to the homologation of a *tableau* of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the *tableau* set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of disturbing the sales and resisting the homologation of the *tableau*, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed on the *tableau* as creditors of the insolvent, on the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property: *Held*, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be cumulated in the same action, (C. P. 149;) that the demands in the original oppositions must be considered as abandoned by the supplemental oppositions; and that any claim for damages against the syndic, personally, for malfeasance, should be brought against him individually, and not by way of opposition to a *tableau* of distribution. Blake v. His Creditors, 520.

VIII. *Actions by Heirs or Legatees to obtain Possession of Successions.*

33. In actions by the heirs, or others entitled to successions administered by curators or testamentary executors, for the possession of such successions, under arts. 1000, 1001, 1002 and 1003 of the Code of Practice, as in every other suit, there must be an issue joined before any final judgment can be rendered; and if the curator or executor does not answer, issue must be made by a judgment by default. C. P. 310, 311, 312. Such actions must be in the ordinary form. The provision of art. 1003, the judge shall pronounce on the claim in a summary manner, only means, as shown by art. 1034, that he shall decide upon it with the greatest practicable celerity, giving it a preference over ordinary cases. Caldwell v. Glenn, 9.

PLEDGE.

See Insolvency, 9. Privilege, 7.

POSSESSION.

1. Persons in possession as tenants cannot, by consenting to possess for a third person, or by permitting others to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlords. C. C. 3408, 3409. Wells v. Hickman, 1.

2. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *fieri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 763. Winn v. Elgee, 100.

3. No one can be permitted to change the character of his own possession; nor can a tenant acquire a title adverse to his landlord's, and continue to possess for himself. Metoyer v. Larenandière, 139.

4. Parol evidence is inadmissible to prove that plaintiff was the owner of the land in dispute, and leased it to the defendant, and that the latter committed a fraud in converting it to his possession. It would tend to make out a title to real estate by parol. Ib.

5. The possession of an agent, is the possession of the principal. Beaumont v. Covington, 189.

6. A possessor in good faith, under a title which he honestly believes to be just in point of fact and form, is entitled to his improvements, and is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title must be such as to entitle the party to the prescription of ten years. The possessor in good faith is one who has just reason to believe himself the master of the thing which he possesses, though he may not be so in fact, (C. C. 3414;) the possessor in bad faith, one who knows that he has no title, or that his title is defective. Ib. 3415. Lowry v. Erwin, 192.

7. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. Ib.

8. A possessor without a just title, owes the fruits and revenues from the commencement of his possession. Ib.

See PRESCRIPTION, 12.

PRESCRIPTION.

1. By an act of the Legislature of the State of Mississippi, of the 26th of November, 1821, sect. 115, it is provided, that any claim against the estate of one deceased, not presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., shall be forever barred, and the estate discharged

therefrom. Plaintiff, a resident of that State, being the holder of a claim against the estate of the deceased barred by that act, commenced an action against the administrator of a part of the succession situated in this State. *Held*, that the claim being barred in Mississippi, must be considered so in this State. Harrison v. Stacy, 15.

2. Prescription is interrupted by a citation to the party in whose favor it is running, to appear before a court of justice on account of the right or claim to which the prescription would apply. This is called a legal interruption, and it matters not whether the suit be before a court of competent jurisdiction, or not. C. C. 3482, 3484, 3516. The party must be cited. No other means of knowledge of the proceedings instituted against him, though brought home to him, will suffice to operate a legal interruption.
Hill v. Barlow, 142.

3. Acceptance of service of citation by a curator *ad hoc* appointed to represent an absent defendant, will not interrupt prescription as to the latter. Art. 177 of the Code of Practice which provides for the waiver, or acknowledgment of service, in writing, under the signature of the defendant or his attorney, on the back of the original petition, does not apply to a curator *ad hoc*. Such waiver or acknowledgment can only be made by the defendant personally, or by the attorney whom he has employed. Ib.

4. The exercise of the right of claiming prescription is an act of ownership; and its abandonment is one of alienation, which no agent can do so as to deprive his principal of his right to claim it, without special authority from the latter. Ib.

5. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1982. Ib.

6. An acknowledgment of a debt by any one of several debtors bound *in solido*, interrupts prescription as to all. The words *joint-debtor* in art. 3517 of the Civil Code, were inserted in the English text of the article through an error of the translator or transcriber. Davis v. Houren, 255.

7. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502. Edwards v. Turner, 382.

8. A partial payment, before prescription acquired, will interrupt the prescription Lejeune v. Hébert, 419.

9. The plea of prescription is one of those peremptory exceptions, which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action, previous to final judgment. Such exceptions raise no issue on the merits. Thus where a judgment by default has been set aside on filing a plea

of prescription, and the exception is overruled, the case cannot be tried on its merits, until put at issue by an answer, or by a judgment by default, regularly entered, after the overruling of the exception. C. P. 345, 346. Ib.

10. A physician's bill is prescribed by three years. C. C. 2503. Arbonneaux v. Letorey, 456.

11. Prescription may be pleaded in every stage of the case before final judgment, and even on appeal; but it must be pleaded expressly and specially. C. C. 3427. The court cannot supply such a plea, where the party, in whose favor it exists, has not thought proper to take advantage of it. C. C. 3426. Ib.

12. Where there was error on the part of the vendor in delivering, and on the part of the vendee in receiving the possession of property sold, such possession cannot serve as a basis for the prescription of ten years; as where lands resold by a purchaser from the United States, having been erroneously located, the possession in conformity thereto was necessarily erroneous. Kittridge v. Landry, 477.

13. No title to any portion of the public lands of the United States can be acquired by prescription. Kittridge v. Dugas, 482.

14. A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art 3510 of the Civil Code; and that the prescription of ten years established by that article is not applicable to such a case. Verdun v. Splane, 530.

15. The master of a merchant vessel or steamer, is an officer, within the meaning of art. 3499 of the Civil Code, and the action for his wages is prescribed by one year. Millaudon v. Martin, 534.

See Possession.

PRIVILEGE.

1. The wages of an overseer are to be paid out of the product of the crop of the year, in preference to the claims of the lessor. C. C. 3226. Tanner v. Tanner, 35.

2. A lessor, though entitled to retain the things on which his lien exists, must, in order to be paid, have them sold in the manner provided by law; and if any conflict arise, from adverse claims to the proceeds, a distribution must be made as provided by the 6th chapter of the 21st title, of the third book of the Civil Code, establishing the order in which privileged creditors are to be paid. Ib.

3. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered. Rachal v. Norman, 88.

4. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. Caseaux v. His Creditors, 268.

5. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment. Ib.

6. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722. Ib.

7. Where a wife is a public merchant carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. C. C. 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. C. C. 2675, 2676, 2677. Deslix v. Jone, 292.

8. Where an owner of ground, an undertaker or builder by trade, borrows a sum of money for the purpose of building thereon, the amount to be advanced to him according to the progress of the work, executing a mortgage on the property improved to secure its re-payment, and employs workmen to construct the buildings under his own directions, the latter will, under art. 2743 of the Civil Code, be entitled to a privilege for the payment of their labor on the building constructed by them, entitling them to be paid in preference to the mortgage creditor. It is only where there is an undertaker interposed between the owner and his workmen, that arts. 2744 and 2745 of the Civil Code are applicable. Where workmen are employed by the proprietor himself, they are put on the same footing, and allowed the same privilege as an undertaker. Succession of Erard, 333.

9. Where the return on a *fi. fa.* states, that it was levied on the proceeds of the sale of certain slaves seized and advertised to be sold at a future day, at the suit of another party, the plaintiff in the execution will acquire no privilege entitling him to be paid by preference, out of the proceeds. *Per Curiam.* The slaves themselves were not seized, and the proceeds of the sale were not in existence at the time, and could not, therefore, be taken possession of. To entitle a seizing creditor to the privilege conferred by arts.

722, 723 of the Code of Practice, the thing seized must be taken possession of by the officer; otherwise, there is no seizure.

Goubeau v. New Orleans and Nashville Rail Road Company, 345.

10. An overseer, whose services have continued during one year, and a part of a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crop of the second year, valid against a third person, who purchases during the second year the plantation and crop then in the ground. The privilege, which had been acquired before the sale, could not be divested by it. Such a privilege is not required to be recorded, in order to preserve it. C. C. 3226, 3243. Welsh v. Shields, 484.

See CONTRACTS, 12.

PUBLIC LANDS OF THE UNITED STATES.

1. A patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud. Carter v. Monetti, 82.
2. The survey of a claim to a portion of the public lands, and its approval by the Surveyor General, are not conclusive upon the government of the United States. Until a patent is issued the title is still in the government, unless it be where the claim has precise and specific boundaries, and has been confirmed by an act of Congress, which, in such a case, is equivalent to a patent. Metoyer v. Larenandière, 139.
4. The settlers on the section of country known as the Neutral Territory, between the Arroyo Hondo and the Sabine, within the limits of the present state of Louisiana, acquired no title to the lands occupied by them, under any custom or usage of the Spanish government, independent of the act of Congress by which their titles were confirmed. Brooks v. Norris, 175.
5. A receipt from the Receiver of Public Moneys for the price of lands purchased from the United States, is sufficient evidence of title to enable the purchaser to maintain an action. Beaumont v. Covington, 189.
6. The decisions of the Register of the Land Office and Receiver of Public Moneys in Louisiana, in relation to confirmed land claims which may conflict or interfere with each other, under the powers conferred by the sixth section of the act of Congress of 3d March, 1831, are not binding on the parties. The act does not take from the courts the right of investigating and deciding on such claims, after those officers have acted thereon.

Terrell v. Chambers, 243.

7. No title to any portion of the public lands of the United States can be acquired by prescription. Kittridge v. Dugas, 482.

PUBLIC THINGS.

The streets of a city, and the banks of a river on which it is built, are *loci publici*, and the municipal authorities are bound to see that the use of them by the public, is not obstructed. They cannot allow any erection thereon

which may render their use incommodious; and, though they may tolerate, temporarily, works not deemed injurious to the rights of the public, no permission of a Council can prevent a subsequent Council from putting an end to such toleration. As where works have been permitted to be erected across the street and the bank, for the purpose of conveying timber to sawmills built on lots fronting on the river, the municipal authorities may order such works to be removed, no one having a right to a permanent occupancy of the banks of a river.

Shepherd v. Third Municipality of New Orleans, 349.

QUASI-CONTRACTS.

1. Charges for drayage of cotton, hauled to a cotton press by an agreement with, and on the sole credit of certain persons, who were in possession of the press under a contract by which the owner stipulated to convey the property to them on certain conditions, cannot be recovered by the drayman against the owner, on his selling the press to other persons. There was no privity of contract between the plaintiff and him, and no proof that he ever assumed to pay the charges. McCauley v. Hagan, 359.
2. Decision in M'Williams v. Hagan, 4 Rob. 374, affirmed. Ib.
3. One who has contracted for a building has no right, by cancelling his contract with the undertakers, to disappoint the expectations of persons, who, on the faith of the contract, have entered into engagements to furnish the latter with materials, or to bestow their labor on the work.

Girarthy v. Campbell, 378.

4. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

QUASI-OFFENCES.

See Offences and Quasi-Offences.

RATIFICATION.

The ratification of an act cures all its defects; and a voluntary execution thereof, amounts to a ratification. C. C. 2252.

Citizens Bank of Louisiana v. Tacker, 443.

See Minor, 4.

directed by art. 3333, before the expiration of that period; and that this inscription may be considered as a renewal of the mortgage between the parties, and against third persons. Minor v. Alexander, 166.

4. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. Mary v. Lampré, 314.
5. Neither the parties, nor their heirs, nor the witnesses to the act by which a mortgage is stipulated, can take advantage of its non-inscription during the first ten years from its date (C. C. 3316;) but it will cease to have effect, even as to them, after that period, if not inscribed before its expiration. C. C. 3333. Lejeune v. Hébert, 419.
6. The privilege of an overseer is not required to be recorded in order to preserve it. C. C. 3184, § 1. 3226, 3243. Welsh v. Shields, 484.

RECOGNIZANCE TO APPEAR AT COURT.

1. The surety in a recognizance for the appearance of a party at a particular term of court, will be liable on his bond, though no proceedings were had against the principal at the term at which he was recognized to appear, where an order was made at that term continuing all cases not disposed of, and, at the succeeding term the principal failed to answer, and the surety failed to produce his body, when called upon to do so.

State v. Plazencia, 417.

2. One who has bound himself in a recognizance to appear at a particular term of the court, will not be absolved by the omission of the Attorney for the State to proceed against him at that term. His appearance at that term, was the only means of protecting him from a forfeiture of his recognizance. *Per Curiam.* The law makes it the duty of the prosecuting attorney to have the parties bound by any recognizance called, and to take judgment against them, if the principal be not produced; but this direction to the attorney, does not release the parties to the recognizance.

State v. Plazencia, 441.

RULE TO SHOW CAUSE.

The right to proceed by a rule to show cause, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, arising in the progress of the contestation, except where a summary proceeding is expressly allowed by law. Thomas v. Bourgeat, 435.

SACRED THINGS.

The provisions of the ancient laws in force in this State concerning the distinction of things into holy, sacred and religious, and the nature and inalienability of those things, having been abolished by art. 447 of the Civil Code, those mentioned in the 5th Partida, law 15, title 5, as religious, sacred, or holy, may now be alienated as any other property.

Ternant v. Boudreau, 488.

SALE.

I. *Requisites and Proof of the Contract of Sale.*
II. *Counter-letters, and Parol Evidence as affecting sales by Authentic Act.*
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I. *Requisites and Proof of the Contract of Sale.*

1. Where an act by which a mortgage is retained is passed in the office of a Parish Judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. So, of the *procès-verbal* of sale made by a Parish Judge while acting *ex officio* as an auctioneer. A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. Dodd v. Crain, 58.
2. The sale of a slave must be in writing, but the law requires no particular form. The statement in a promissory note, made by the purchaser, that it was given for the price of the slave, is sufficient. Rachal v. Normand, 88.
3. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. Mary v. Lampré, 314.
4. An agent authorized to sell, cannot sell to himself. Allard v. Allard, 320.
5. A verbal sale of a slave is good against the vendor, only when acknowledged by him, under oath, in answer to interrogatories, and where there was actual delivery of the slave. C. C. 2255. Where the answer denies

the sale, it cannot be contradicted by the evidence of witnesses. Ib. 2415. Were it permitted, the prohibition of the law as to testimonial proof of verbal sales of real estate, or slaves, would be evaded, by alleging fraud, and propounding interrogatories, and, when answered in the negative, by offering testimony under the pretence of contradicting the answers.

Haydel v. Betts, 428.

6. Where no price has been fixed upon, there can be neither a sale, nor a promise to sell. C. C. 1757, 2414, 2437, 2439. Gorham v. Hayden, 450.

7. The provisions of the ancient laws in force in this State concerning the distinction of things into holy, sacred and religious, and the nature and inalienability of those things, having been abolished by art. 447 of the Civil Code, those mentioned in the 5th Partida, law 15, title 5, as religious, sacred, or holy, may now be alienated as any other property.

Ternant v. Boudreau, 488.

8. Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (C. C. 451,) susceptible of ownership, (C. C. 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him. Ib.

9. A sale by the heir of all the moveable and immoveable property of a succession, and of all the rights which he has or may have thereto, places the vendee in the situation in which the heir stood at the death of his ancestor, and entitles such vendee to claim articles of gold and precious stones deposited in the tomb of the ancestor. It is the sale of a succession, which includes all the rights and obligations of the deceased as they existed at the time of the death, or which have since accrued, or may subsequently arise, without exception. C. C. 869, 870. Such articles are an integral part of the inheritance, and the heir cannot claim them against the vendee of the succession, on the ground that the latter had no intention, at the time of the sale, of purchasing, nor the former of selling them. Ib.

II. *Counter-letters, and Parol Evidence as affecting Sales by Authentic Act.*

10. Defendant claimed to be the owner of a slave under a notarial act of sale, executed to him on the 26th of March. Plaintiff, cited in warranty, as the representative of the alleged vendor, offered in evidence a letter from the defendant to the latter, dated in that month, the day not mentioned, in which, after stating that he has not title to a sufficient number of negroes to obtain a loan which he desired, he requests the alleged vendor "*to send him an act of sale for the slave*" sued for "*for the present.*" *Held*, that this was a counter-letter, showing that there was no sale as between the parties.

Cox v. Camp, 425.

11. The stipulations in a contract of sale, by authentic act, cannot, between the parties or their representatives, be destroyed or weakened by parol evidence. Nothing but a counter-letter can have that effect.

Citizens Bank of Louisiana v. Tucker, 443.

III. *Obligations of Vendor.*

12. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered.

Rachal v. Norman, 88.

13. A vendor will not be responsible, where the purchaser has voluntarily surrendered the possession of the thing sold, without any action having been brought against him. Minor v. Alexander, 166.

14. Defendants contracted to purchase a piece of land for a certain sum, payable part in cash, and the remainder at future periods, but refused to execute the contract on the ground that the property was encumbered with mortgages. Plaintiffs produced an act which had been prepared for the conveyance of the land to the defendants, containing a clause for the intervention of the mortgagees, and the release of their claims, on the payment of the cash price, and the delivery of the notes, for the future instalments according to the terms of the contract. The act was not signed by the mortgagees, but it was proved that they were ready to sign it, on the payment of the cash price and the delivery of the notes. In an action for a specific performance: *Held*, that the existence of the mortgages authorized the defendants to retain the price until the mortgages were released or security given, but did not absolve them from the obligation of completing the purchase; and that plaintiffs offered what was equal to a release of the mortgages, and better than any security which the court could order to be given —the intervention of the mortgagees in the act of sale, for the purpose of releasing their claims, on the compliance of the purchasers with the terms of the sale. Judgment for the plaintiffs. Grimshaw v. Hart, 265.

15. Where property is sold without any declaration of the mortgages existing on it, and it is not shown that the purchaser was aware of their existence, the vendor will be bound to exhibit a valid and unincumbered title, previous to calling on the vendee to perform his contract.

Nash v. Parker, 324.

16. A purchaser, disquieted in his possession by a third person's setting up title to the land, of whose claims he was uninformed before the sale, may withhold the price, until quieted in his possession, unless the vendor prefer to give security. C. C. 2535. Lacour v. Landry, 487.

IV. *Vendor's Privilege.*

17. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. Caseaux v. His Creditors, 268.

18. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722. Ib.

V. *Obligations of Vendee.*

19. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. Minor v. Alexander, 166.

20. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the property producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. Daigle v. Bruzzé, 418.

21. Where for the convenience of the vendors, in order to enable them to divide the price among themselves, the notes originally given by the vendees, are cancelled, and others executed in their place, each for smaller sums, but in the aggregate for the same amount, in the same form, and payable at the same periods, nothing being changed as to the position or obligations of the purchasers, there is no novation.
Citizens Bank of Louisiana v. Tucker, 443.

VI. *Rescission.*

22. An action against a party in possession of slaves, in which the plaintiff prays for a judgment declaring the title under which the former holds to be fraudulent, and ordering the slaves to be sold for the purpose of paying a balance due to him as vendor, with damages for the expense to which he has been subjected, and recognizing his privilege as a vendor, must be brought before the court of the defendant's domicil, and not of the parish where the slaves may be. C. P. 89, 129, 162.
Boner v. Elgee, 6.

23. It is essential to a revocatory action in which an act of an insolvent is attacked, as having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit. Lawrence v. Bowman, 21.

24. Where defendants, with a full knowledge of all the circumstances, agree to take back lands, which originally belonged to them from plaintiff, who asserted title thereto, and to pay a certain sum as the price of such rights as the latter may have acquired, he will, on the failure of the defendants to pay the amount agreed upon, be entitled to rescind the contract, and to be reinstated in the position he previously occupied. The principle that a purchaser who acquires what he discovers to be his own is not bound to return it, nor to pay for it, though correct in the abstract, is inapplicable to such a case. Copley v. Flint, 54.

25. An action of rescission may be sustained by a vendor against the property in the hands of a third person, though the former have acknowledged in the act of sale that the price had been paid, where such third person had identified himself with the first purchaser, and was aware that the price had not been paid by him. Ib.

26. The action allowed by the tenth and eleventh sections of the act of 28th March, 1840, abolishing imprisonment for debt, cannot be maintained, unless the unjust advantage, or preference given by the creditor to one of his debtors, or the conveyance, transfer, mortgage, or pledge of his property made by him, shall have had the effect of injuring the complainant. Thus, where the property alleged to have been fraudulently and illegally sold, had been seized under a *fi. fa.* by a third person, who had, under art. 722 of the Code of Practice, by the mere act of seizure, acquired a preference over the other creditors, the plaintiff cannot maintain his action; as the annulling of the sale could only benefit the creditor who had acquired a privilege by his seizure. Lott v. Gray, 152.

27. The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.
Evans v. Wilkins, 172.

28. The law raises no presumption of fraud from the fact that the vendor and vendee were brothers-in-law. Allard v. Allard, 320.

29. In an action to rescind a sale made by an agent, whose power to sell is conceded, the manner in which he disposed of the proceeds, whether in payment of debt due to himself, or not, is a question not before the court.
Ib.

30. A purchaser who receives the rents of the property purchased, and subsequently declines to complete the contract on the ground that the vendor could not make an unincumbered title, is bound to refund the rents so received. Nash v. Parker, 324.

31. To entitle a purchaser to rescind a contract of sale, or to recover damages against his vendor, for failing to comply with its terms, the latter must be put in default, in the manner directed by law. C. C. 1906, 1907, 1908, 1925, 1927. A party is put in default by the terms of his contract, only when it specially provides that he should be deemed to be in default, by the mere act of his failure. C. C. 1905. Gorham v. Hayden, 450.

32. A vendee, in possession under a defective title, may suspend the payment of the price until secured against the danger of eviction; but he has no right to a rescission of the sale. C. C. 2535. But this article applies only to a vendee who has accepted the sale, and is in possession; not to one who discovers before accepting a deed or possession, that the vendor sold him what belonged to another. Rousseau v. Tête, 471.

33. The formalities prescribed for the sale of the property of minors, being exclusively for their benefit, the nullities resulting from their omission are

purely relative, and the minors alone, after coming of age, can avail themselves of them. Such a sale is, consequently, not absolutely null. Ib.

34. A purchaser of a tract of land and slaves, who has been evicted as to one-third of the property, has a right to have the sale cancelled *in toto*, and to be relieved from the payment of the price. C. C. 2487.

McCollom v. McCollom, 506.

VII. *Judicial Sales.*

35. A sale under execution must be made either on the premises, or at the seat of justice of the parish, unless with the consent of the debtor, or it will be annulled. C. P. 664, 665. Lawrence v. Bowman, 21.

36. The *procès verbal* of the adjudication of property sold by a Court of Probates is evidence of the sale, and no act under the signatures of the parties, is necessary to perfect it. Faulk v. Pinnell, 26.

37. The *procès verbal* of a sale, made by a Parish Judge, by which a mortgage is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733. Ib.

38. Where on an application for a monition under the act of 10th March, 1834, by a purchaser at a Sheriff's sale, for the purpose of confirming his title to the property purchased, it is alleged by the party opposing the homologation of the sale, that the previous advertisements required by law were not made, the *onus probandi* is on the petitioner. They are essential to the validity of the sale, and must be proved when denied. Ex parte Murray, 74.

39. The legal effect of an adjudication under a *fieri facias*, is to transfer to the purchaser all the rights and claims of the party in whose hands the property was seized, (C. C. 2598. C. P. 690); and the Sheriff is bound, thereupon, to pass an act of sale to the purchaser, and to put him in possession of the property sold. C. P. 691. Winn v. Elgee, 100.

40. After an adjudication under a *fi. fa.*, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is essential to maintain a possessory action. C. P. 47. He must, if he still claims the property, resort to a direct action to annul the Sheriff's sale. Ib.

41. Purchasers at Sheriffs' sales cannot be affected by irregularities occurring after the sale—no act of the Sheriff, subsequent to the sale, can affect his rights. The adjudication made by him has, of itself, the effect of transferring to the purchaser all the rights and claims of the party in whose hands the property was seized. C. P. 690. It is the last proceeding which concerns the purchaser; it fixes his condition, and is the basis of his title.

Succession of Goodrich, 107.

42. The return of the Sheriff on a *fieri facias* is not conclusive as to the facts

stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the contents of the return, that the formalities required by law for the validity of Sheriff's sales had been complied with, and how they were fulfilled. Ib.

43. One claiming under a Sheriff's sale who produces the judgment, execution, and Sheriff's return, showing the adjudication to him, has nothing else to show in support of his title. It is for the opposite party to establish any irregularity or informality in the sale. Ib.

44. Executory process by seizure and sale, is a summary and severe remedy and the formalities prescribed by law must be strictly complied with, or the property will not be transferred, and the purchaser acquire no title.
Lowry v. Erwin, 192.

45. To support a sale by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. Ib.

46. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist.
French v. Prieur, 299.

47. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The purchaser takes the property free of the incumbrances; and the Probate Court may order their erasure. Ib.

48. Plaintiff having recovered a judgment against defendants, caused a *fi. fa.* to be levied on a certain portion of a rail road belonging to them, and on certain fixtures, machinery, lumber, and other personal property connected with the road. The whole was offered for sale *in globo*, the Sheriff producing at the sale a certificate from the Recorder of Mortgages showing the existence of a mortgage, having a preference over the plaintiff, in favor of third persons, "on all the rights, privileges, immunities, and titles of the Company." Plaintiff was the highest bidder, but offered a sum less than the amount of the mortgage. The officer returned that there had been no sale. On a rule on the latter, the defendants, and the mortgagees, to show cause why the property offered for sale should not be delivered to plaintiff: *Held*, that there was no adjudication, and that the rule should be discharged.
Ranney v. Orleans Navigation Company, 380.

49. Bricks, made by the former owner, not to be used on the place, but for sale, and lying there at the time of a Sheriff's sale of the premises, are moveables, and not included in the adjudication of the land to the purchaser. C. C. 459, 460, 464, 465, 468. Key v. Woolfolk, 424.

50. The purchaser of a slave, sold under a *fi. fa.* against a party in possession, not shown to have been aware of the defects in the title of the latter, being

a possessor in good faith, will be responsible to the owner for the value of his services, only from judicial demand. C. C. 495, 3416.

Haydel v. Betts, 438.

51. Though but one instalment of a debt secured by a mortgage by authentic act, be due, an order of seizure and sale may be obtained for the whole amount of the debt, but the sale must be on terms of credit corresponding with the periods at which the remaining instalments fall due.

Robinson v. Aubert, 461.

52. An adjudication of succession property made and recorded by a Clerk of a Court of Probates legally appointed, is, of itself, a complete title. C. C. 2601. Rousseau v. Tête, 471.

53. The acquired rights of a party to the proceeds of a sale made under an execution in his favor, cannot be affected by subsequent acts, or proceedings, to which he was not a party. Dugas v. Her Husband, 527.

See EXECUTION, 3, 8, 16.

SHERIFF.

1. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *fieri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762. Winn v. Elgee, 100.

2. An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 192.

SHIPPING.

1. A master of a steamer has no authority to bind the owners farther than for the necessary expenses of the boat. Lambeth v. Vawter, 127.

2. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. But it does not follow, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that these are responsible to the proprietors for each other. Thus, the captain cannot be held responsible to the owners, for damages to which the latter were subjected in consequence of an injury to another vessel, resulting from mismanagement of the steamer during the pilot's watch, and when the captain was asleep. *Per Curiam.* It is physically impossible that the master

of a vessel can always be on deck, and he cannot be held liable for every act or omission of the other officers. Davis v. Houren, 255.

3. The proprietors of steamers, such as are employed in towing vessels between New Orleans and the Gulf of Mexico, are commercial partners. C. C. 2796. *Per Curiam.* It does not follow because these boats have no privilege for their hire, that their owners are not responsible in the same manner as the owners of boats differently employed. Privileges are arbitrary provisions of the law. Ib.
4. The master of a vessel is answerable for the baggage and effects of a passenger delivered to him, and not restored, nor accounted for. Cosnier v. Golding, 297.
5. Action by the plaintiff for two months wages as the pilot of a river steamer. It was proved that he had been employed for the season, at certain wages, payable monthly; that having determined to leave the boat, he applied to the clerk, in the middle of a voyage, for the payment of two months wages then due, who refused to pay him then; that he never applied to the captain for payment, never informed him of the refusal of the clerk, nor gave him any notice of his intention to leave. It was shown that the captain remonstrated with him for leaving, and that his departure injured the voyage; also that the steamer had made one or more voyages during the first month, and had earned freight, by which the defendants were benefitted. *Held*, that neither the expiration of the month, nor the failure to pay his wages, for which the law gave him a privilege on the vessel, justified the plaintiff in leaving the steamer during the voyage; that by doing so, he forfeited the wages of the last month; but that one or more voyages having been made during the first month, by which freight was earned, plaintiff should have been paid the wages of the first month, and that they were not forfeited by his subsequent desertion. Baldwin v. Bennett—Rehearing, 311.
6. The well settled principles of maritime law, that where an officer or seaman employed for a voyage, at monthly wages, voluntarily leaves the vessel, before its termination, without good cause, or the assent of the master, he will forfeit his wages—that if the vessel be lost and earns no freight, the mariner gets no pay, though engaged by the month—and that even where no definite voyage is specified or *terminus* fixed, the contract is subject to the equitable restriction that it shall not be terminated at a time, or under circumstances particularly inconvenient to the other party, should be extended as far as applicable, to persons engaged in the navigation of our rivers and along our coasts. Ib.
7. The master of a merchant vessel or steamer, is an officer, within the meaning of art. 3499 of the Civil Code, and the action for his wages is prescribed by one year. Millaudon v. Martin, 534.
8. The steam tow-boats, plying on the Mississippi, between New Orleans and the Gulf of Mexico, are vessels performing voyages, like other vessels or steamers. Ib.

SLANDER.

See OFFENCES AND QUASI-OFFENCES.

STARE DECISIS.

The rule *stare decisis* is entitled to great weight and respect, where there has been on any point of law a series of adjudications, all to the same effect; but a single decision, believed to have been unadvisedly or erroneously made, will be overruled. Griffin v. His Creditors, 225.—Rehearing.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*
II. *Statutes of the State.*
III. *Statutes of Pennsylvania.*
IV. *Statutes of Mississippi.*

I. *Statutes of the United States.*

1789, September 24, § 11. Judiciary act—jurisdiction of Circuit Court. Lowry v. Erwin, 192.

1790, May 26. Authentication of judicial proceedings. Jones v. Hunter, 235.

——, July 20, § 3. Seamen in merchant service. Millaudon v. Martin, 534.

1811, March 3. Land claims and public lands in territories of Orleans and Louisiana. Evans v. Wilkinson, 172. Kittridge v. Landry, 477. Kittridge v. Dugas, 482.

1819, March 3. Piracy. Millaudon v. Martin, 534.

1820, May 11. Land claims in Louisiana. Kittridge v. Landry, 477. Kittridge v. Dugas, 482.

——— 15. Piracy. Millaudon v. Martin, 534.

1823, February 28, § 1. Reviving act of 11th May, 1820, relative to land claims in Louisiana. Kittridge v. Landry, 477. Kittridge v. Dugas, 482.

1824, May 26. Titles to lands between Rio Hondo and Sabine. Brooks v. Norris, 175.

———. Practice in courts of United States in Louisiana. Lowry v. Erwin, 192.

1828, May 24. Claims to lands between Rio Hondo and Sabine. Brooks v. Norris, 175.

1831, March 3, § 6. Powers of Register and Receiver to decide on land claims in Louisiana. Terrell v. Chambers, 243.

1832, June 15. Authorizing inhabitants of Louisiana to enter back-lands. Beaumont v. Covington, 189.

1835, March 3, § 3. Offences by masters and officers of vessels. Millaudon v. Martin, 534.
1841, August 19. Bankruptcy. Lewis v. Fisk, 159.

II. *Statutes of the State.*

1813, March 28, § 18. Clerk's fees. State v. Phelps, 308.
1816, —— 7. Acquisition of a residence in the State. Lowry v. Erwin, 192.
1818, —— 16. —————————— Ib.
1819, —— 3. Lease. M'Lean v. Carroll, 43.
1821, February 14. Bills of exchange and promissory notes. Minor v. Alexander, 166. Marsoudet v. Jacobs, 276.
1827, March 13. Bills and notes. Mechanics and Traders Bank of New Orleans v. Jemison, 90. Marsoudet v. Jacobs, 276. Gordon v. Dreux, 299. Becnel v. Tournillon, 500.
———— 20, § 5. Registry of conveyances. Mary v. Lampré, 314.
1828, —— 2. Tax on money or property inherited by or bequeathed to absentees. Succession of Oyon, 504.
———— 25, § 19. Appeals. State v. Grant, 295.
1829, January 23. Minors. Wilson v. Craighead, 429.
1831, March 25, § 3. Injunctions. Gorman v. Hayden, 450.
1832, April 2, § 1. Divorce. C. v. E., 135.
1834, March 10. Titles of purchasers at judicial sales. Ex parte Murray, 74.
————, § 5. Powers of Mayor and City Council of New Orleans. Second Municipality of New Orleans v. Orleans Cotton Press Company, 40.
1835, April 2. Charter of Red River Rail Road Company. Red River Rail Road Company v. Young, 39.
1837, February 25. Minors. Wilson v. Craighead, 429.
——, March 9, § 15. Charter of Mexican Gulf Railway Company. Mexican Gulf Railway Company v. Viavant, 305.
1839, —— 14, § 3. Establishing Commercial Court of New Orleans. Greiner v. Thielen, 365.
———— 20, § 23. Dilatory exceptions. Welsh v. Shields, 484.
1840, —— 28, § 10, 11. Acts of debtor in fraud of creditors. Lott v. Gray, 152.
1841, February 10, § 17. Compensation of jurors in New Orleans. Liles v. New Orleans Canal and Banking Company, 273. Baldwin v. Bennet, 309.
1842, February 5. Reviving charters of banks in New Orleans. City Bank of New Orleans v. Barbarin, 289.
——, March 14. Liquidation of banks. Commissioners of Exchange and Banking Company of New Orleans v. Mudge, 387. Ib.—Rehearing, 397.
———— 16. Successions. Wilson v. Murrell, 68.

1842, March 22. *Fieri facias.* Buard v. De Russy, 111.
———— 26. Liquidation of banks. Commissioners of Exchange and Banking Company of New Orleans v. Mudge, 387. Ib.—Rehearing, 397.
———— Tax on money or property inherited by, or bequeathed to absentees. Succession of Oyon, 504.
1843, —— 22. Appeal and notice of judgment. Prudhomme v. Edens, 64.
——, April 5, § 2. Off-sets to debts due to banks in liquidation. Commissioners of Exchange and Banking Company of New Orleans v. Mudge, 387. Ib.—Rehearing, 397.

III. *Statutes of Pennsylvania.*

1836, February 18, § 6. Charter of Bank of the United States. Erwin v. Lowry, 28.

IV. *Statutes of Mississippi.*

1821, November 26, § 115. Claims against estates of deceased persons. Harrison v. Stacy, 15.
1837. Introduction of slaves into the State. Cotton v. Brien, 115.

STEAMER.

See SHIPPING.

SUBROGATION.

See PARTNERSHIP, 12.

SUCCESSIONS.

I. *Executors, Administrators and Curators.*
II. *Inventory of Property.*
III. *Claims against Successions.*
IV. *Heirs and Legatees.*
V. *Sale of Property of Successions.*

I. *Executors, Administrators and Curators.*

1. Before a creditor of a succession can proceed against the surety of a curator, executor, &c., he must, under the sixth section of the act of 16th March, 1842, chap. 120, have pursued the steps pointed out by arts. 1055, 1056, and 1057, of the Code of Practice, and have exhausted all the means which the law gives him to obtain payment from the principal, officially and personally. Wilson v. Murrell, 68.
2. The administrator of an estate is amenable, during his lifetime, to the Probate Court from which he derives his authority; but where he dies without having rendered an account, it can be rendered only in the Probate Court

in which his own estate is being administered. But a claim of the person who afterwards became administrator against his intestate, acquired before he became administrator, must be prosecuted before the court in which the succession of the intestate was opened. Thomas v. Bourgeat, 435.

II. *Inventory of Property.*

3. A surviving wife who has omitted to cause an inventory to be made of the effects left by her husband, however inconsiderable, in the manner prescribed for beneficiary heirs, cannot renounce the community. It is not enough that she present a petition to the Probate Court, praying that an inventory may be made; she must see that it is done. C. C. 2379, 2380, 2381, 2382. She is bound to point out to the Judge all the effects of the community, the concealment or making away with any part of which, will render her incapable of renouncing. Ib. 2387. Chapman v. Kimball, 94.

III. *Claims against Successions.*

4. By an act of the Legislature of the State of Mississippi, of the 26th of November, 1821, sect. 115, it is provided, that any claim against the estate of one deceased, not presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., shall be forever barred, and the estate discharged therefrom. Plaintiff, a resident of that State, being the holder of a claim against the estate of the deceased barred by that act, commenced an action against the administrator of a part of the succession situated in this State. *Held*, that the claim being barred in Mississippi, must be considered so in this State. Harrison v. Stacy, 15.

5. A creditor of a succession, holding a claim which had been acknowledged, in writing, by the executor to be just, and had been placed among the admitted claims against the estate, subsequently petitioned the Probate Court to have the same ranked as a privileged debt, but did not make the executor a party to the proceeding. A judgment having been rendered *ex parte*, establishing the privilege, on appeal by the executor: *Held*, that the executor, not being a party, the judgment must be reversed.

Succession of Lilley, 24.

6. Though an executor have acknowledged in writing a claim against the estate to be correct, if before paying it he discovers that it had been discharged by the deceased, it is his duty to protect the succession against a second payment. Ib.

7. The holder of a note secured by a mortgage, signed by one since deceased, cannot obtain an order of seizure and sale. He is only entitled to a judgment to be paid *in concurso*, according to his rank relatively to the other creditors, and in the due course of administration. Erwin v. Lowry, 28.

8. Where a defendant in an action to recover a sum of money dies *pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in

the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an d ministrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P., 924. Thomas v. Cortes, 44.

9. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. Ib.

10. An order of seizure and sale cannot be obtained either from a state court, or a Court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates.

Lowry v. Erwin, 192.

11. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor. Ib.

12. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,)

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against property belonging to such a succession. It wants jurisdiction, *ratione materiæ*. Such jurisdiction belongs exclusively to the Court of Probates. Collier v. Stanbrough, 230.

See 2 *Supra*.

IV. *Heirs and Legatees.*

13. In actions by the heirs, or others entitled to successions administered by curators or testamentary executors, for the possession of such successions, under arts. 1000, 1001, 1002 and 1003 of the Code of Practice, as in every other suit, there must be an issue joined before any final judgment can be rendered; and if the curator or executor does not answer, issue must be made by a judgment by default. C. P. 310, 311, 312. Such actions must be in the ordinary form. The provision of art. 1002, that the judge shall pronounce on the claim in a summary manner, only means, as shown by art. 1034, that he shall decide upon it with the greatest practicable celerity, giving it a preference over ordinary cases. Caldwell v. Glenn, 9.

14. The acknowledgment of an illegitimate child in a will, is sufficient to entitle such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227.
Jones v. Hunter, 236.

15. Art. 1589, of the Civil Code, creates no exception to the rule, that the transmission of immoveable property situated in this State, whether by inheritance or testamentary disposition, must be according to our laws. Ib.

16. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. Ib. 1474.
Ib.

17. Where an emancipated minor, joins with his co-heirs in an act of settlement and partition of the succession of his mother, and accepts his portion as ascertained thereby, and there is no evidence that the settlement did not embrace all the property of the succession, he will be concluded by it.
Wilson v. Craighead, 430.

18. Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (C. C. 451,) susceptible of ownership, (C. C. 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him.
Ternant v. Boudreau, 488.

19. A sale by the heir of all the moveable and immoveable property of a succession, and of all the rights which he has or may have thereto, places the vendee in the situation in which the heir stood at the death of his ancestor, and entitles such vendee to claim articles of gold and precious stones deposited in the tomb of the ancestor. It is the sale of a succession, which includes all the rights and obligations of the deceased as they existed at the

time of the death, or within [illegible] without exception. C. C. 889, 870. [illegible] the inheritance, and the heir [illegible] succession, on the ground that [illegible] sale, of purchasing, nor the former of [illegible]. Ib.

20. The 4th section of the act of 28 March, 1843, imposing a tax of [illegible] cent on all sums, or on the value of all property, received by any non-resident alien, as heir, donee, or legatee, from any succession opened in this State, or on so much thereof as is situated in this State, applies only to successions opened, by the death of the ancestor, subsequently to the passage of the act. Succession of Cyon, 594.

V. *Sale of Property of Successions.*

21. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist. French v. Prieur, 20.

22. A sale of the property of a succession, legally and properly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The [illegible] of the succession of the inventories and the Probate Court may order their cancellation. Ib.

23. An adjudication of [illegible] a Court of a Court of Probates [illegible] Bennecon v. Tarpe[illegible]

SUPERSEDEAS.

If the mandate of the Supreme Court be not obeyed the party against whom the judgment has been rendered [illegible] in which the execution is [illegible] Lanaham v. Taylor, 49.

SURETY.

1. A surety has the right [illegible] of his contract. The creditor has no right to make [illegible] beneficial to the surety, under the penalty of relinquishing [illegible] Gayle v. Wooldridge, 47.

2. The question is a bond to the State for the good behavior of a party and his appearance at court, [illegible] of all the pleas which their principal could urge. A [illegible] bound as to their principal, will discharge them. The State v. Bass, 69.

3. Before a creditor of a succession [illegible] the surety of a succession, executor, &c., he must [illegible] of the act of 28 March, 1843, page 190, have passed [illegible]

and 1057, of the Code of Practice, and have exhausted all the means which the law gives him to obtain payment from the principal, officially and personally. Wilson v. Murrill, 68.

See Bills of Exchange and Promissory Notes, 9. Recognizance to appear at Court.

TAX.

1. The 19th section of the act of 25 March, 1828, amending the Civil Code and Code of Practice, which grants an appeal in any case in which it is contended that the right of imposing a tax is contrary to the constitution or to the laws of the State, whatever may be the amount of the tax, refers only to claims for taxes sued for originally before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans; and where the amount claimed is under three hundred dollars, the Parish Court in the Parish of Orleans, and the District Court, in the other Parishes of the State, are the highest courts to which such an appeal can be taken. Though such a claim were sued for originally in the Commercial Court, no appeal can be taken to the Supreme Court. State v. Grant, 295.

2. The 4th section of the act of 26 March, 1842, imposing a tax of ten per cent on all sums, or on the value of all property, received by any non-resident alien, as heir, donee, or legatee, from any succession opened in this State, or on so much thereof as is situated in this State, applies only to successions opened, by the death of the ancestor, subsequently to the passage of the act. Succession of Oyon, 504.

TESTAMENT.

See Donations Mortis Causa.

TREATY.

See Caddo Indians, 3, 4. Evidence, 24.

TRESPASS.

See Offences and Quasi-Offences.

TRUST.

See Insolvency, 10, 11, 12.

UNDERTAKER.

See CONTRACTS, 13. PRIVILEGE, 8. QUASI-CONTRACTS, 3.

USURY.

See INTEREST, 1, 4.

END OF VOLUME VI.